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A  
**DIGEST OF THE QUESTIONS**  
ASKED AT THE  
**FINAL EXAMINATION OF ARTICLED CLERKS**  
IN  
**THE COMMON LAW, CONVEYANCING, AND  
EQUITY DIVISIONS.**

FROM  
**THE COMMENCEMENT OF THE EXAMINATIONS IN 1836  
TO THE PRESENT TIME,**

WITH  
**A N S W E R S ;**

**ARRANGED, AS FAR AS PRACTICABLE, IN THE SAME ORDER AS THE  
TEXT BOOKS FROM WHICH THEY ARE TAKEN:**

ALSO  
**LISTS OF STATUTES REFERRED TO AND CASES CITED,**  
WITH  
**A TIME TABLE IN AN ACTION ;**

AND THE  
**MODE OF PROCEEDING, AND DIRECTIONS TO BE ATTENDED  
TO AT THE EXAMINATION,  
WITH THE RULES OF THE HONOUR EXAMINATION.**

BY  
**RICHARD HALLILAY, Esq.**

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**THIRTEENTH EDITION.**

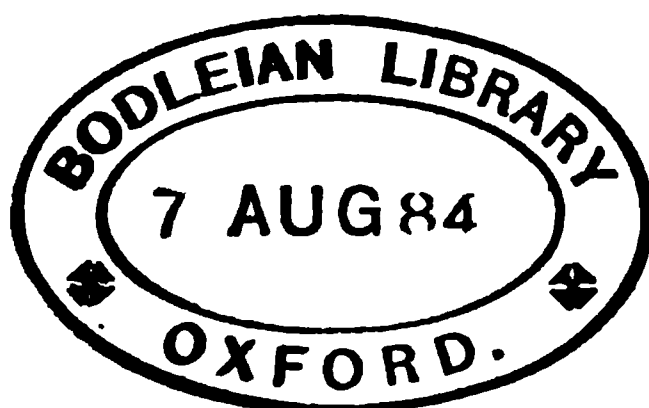
**By H. WAKEHAM PURKIS, SOLICITOR.**

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## Preface to the Thirteenth Edition.

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IN no former edition of this work have greater alterations been required than in the present. The important Conveyancing Acts of 1881 and 1882, the Bills of Sale Amendment Act, 1882, the Settled Land Act, 1882, and the Married Women's Property Act, 1882, as also the New Rules of Court, have all come into operation since our last edition was published, and we have carefully amended, to the best of our ability, the former answers to meet the altered state of the law.

If, as is probable, we have overlooked some minor points, or put a wrong construction on some of the new enactments, communications are requested for the benefit of future editions.

1, LINCOLN'S-INN-FIELDS.

*May, 1884.*

C





## Preface to the Fifth Edition.

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A FOURTH and larger Edition of this Digest having been exhausted, and a new one called for, I have used all diligence in the preparation of it.

Not only have many answers been re-written, but in the Common Law and Equity Branches the chapters have also been re-arranged. There are now several text writers, whose works are studied by all Law students: of these are "Stephen's Commentaries," "Smith's Action at Law," "Williams on the Law of Real Property," "Smith's Manual of Equity Jurisprudence," &c. I have, therefore, not only referred to these works, as well as to statutes, rules, orders, and cases, as authorities for many answers, but, in order to assist, as much as possible, the articulated clerk in his course of study, I have, so far as the questions would permit, followed the very arrangement of the works from which a majority of the answers is derived. Thus after grouping the questions and answers on the Law of Contracts under their respective heads, the practice part of the Common Law Branch is now arranged, chapter by chapter, with "Smith's Action at Law." So in arranging the questions on the Principles of Equity, I have followed the exact order of "Smith's Manual of Equity." The student will thus be enabled, after reading a chapter in any work on the Law of Contracts, but especially after doing so in either of these two works, to take up his digest and examine himself and ascertain if he retains the substance of what he has read, or whether further application is necessary. The Conveyancing branch I could not arrange to meet any one work, as the questions take so wide a scope, and are derived from such a variety of text books and cases.

All the questions asked since the publication of the last Edition (including those for Trinity Term last, which will be found in the Appendix) have, of course, been added, as also several that had, notwithstanding great care, been omitted in former editions; and I have made the alterations rendered necessary by new statutes, orders, and decisions, including the County Court Amendment Act, which,

although it does not come into force until the 1st January, 1868, I could not well omit.

As the same text books are so often cited as authorities, I have abbreviated the reference to them; thus "Stephen's Commentaries;" is cited as "St. C." A Table of Abbreviations will be found after the "Table of Contents."

Attention to the foot notes is invited, as they not only contain in many cases further information, but frequently give a different form of the question to that in the text, but require the same answer.

And to make the work as complete as possible, I have added a Common Law and Equity Time Table, and greatly enlarged the Index.

R. H.

*October, 1867.*

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A. & E. ....	Adolphus and Ellis's Reports, King's Bench. 12 vols.
Adams, Eq.....	Adams on the Principles of Equity.
Add. Cont. ....	Addison on the Law of Contracts.
Alln. Wills and Adms. ....	Allnutt's Practice of the Law of Wills & Administrations,
Arch. Co. Ct. P. ....	Archbold's County Court Practice.
Arch. L. & T.....	Archbold's Law of Landlord and Tenant.
Arch. Nisi Prius ....	Archbold's Law of Nisi Prius.
Arch. New Pract. ....	{ Archbold's New Practice of the Superior Courts of Common Law.
Atk.....	Atkyns's Reports, Chancery. 3 vols.
Ayck. Pr. ....	Ayckbourn's Practice of the Court of Chancery.
B. & A. ....	Barnewall and Alderson's Reports, King's Bench. 5 vols.
B. & Ad. ....	Barnewall and Adolphus' Reports, King's Bench. 5 vols.
B. & C. ....	Barnewall and Creswell's Reports, King's Bench. 10 vols.
Bart. Conv.....	Barton's Precedents in Conveyancing, with Notes.
Beav. ....	Beavan's Reports, Rolls Court. 35 vols.
Bing. ....	Bingham's Reports, Common Pleas. 10 vols.
Bing. N. S.....	Bingham's Reports, New Series, Common Pleas. 6 vols.
Bitt. Pract. Cas. ....	Bittlestone's Practice Cases.
Bl. Com. ....	Blackstone's Commentaries.
Bro. C. C. ....	Brown's Chancery Cases. 4 vols.
Brow. R. P. Stats.....	Browell's Real Property Statutes.
Burr. ....	Burrow's Reports, King's Bench. 5 vols.
Burt. Comp. ....	Burton's Compendium of the Law of Real Property.
Bro. Max. ....	Broom's Legal Maxims.
Bul. N. P. ....	Buller's Law of Nisi Prius.
Byles, B. ....	Byles on the Law and Practice of Bills of Exchange, &c.
C. B. ....	{ Manning, Granger and Scott's Common Bench Reports. 18 vols.
Ch. Div. ....	Chancery Division (Law Reports).
C. O. r. a. ....	{ Consolidated Orders of the Court of Chancery—Rule, Article.
Chit. Arch.....	{ Chitty's Archbold's Practice of the Court of Queen's Bench, Common Pleas, and Exchequer.
Chit. Cont. ....	Chitty on the Law of Contracts.
Chit. Pr. Forms.....	{ Chitty's Forms of Practical Proceedings in the Superior Courts.
Cl. & Fin. ....	Clark and Finnelly's Reports, House of Lords. 12 vols.
Co. Lit. ....	Coke upon Littleton.
Com. Dig. ....	Comyn's Digest.
Coote, Mort. ....	Coote on the Law of Mortgages.
Coote's Prob. Pr. ....	Coote's Practice of the Court of Probate.
Cro. J.....	Croke's Reports in the reign of King James.
Curt. ....	Curteis' Ecclesiastical Reports. 3 vols.

D. & J.....	De Gex and Jones' Chancery Appeals. 4 vols.
Dart's V. and P.....	Dart's Law of Vendors and Purchasers.
Darl. Trusts .....	Darling on the Law of Trusts and Trustees.
Dan. Ch. Pr. ....	Daniel's Practice of the Court of Chancery.
David. Conv. ....	Davidson's Precedents in Conveyancing, with Notes.
De G. M. & G. ....	De Gex, Macnaghton and Gordon's Reports. 8 vols.
De G. & S. ....	De Gex and Smale's Reports. 5 vols.
Dowl. ....	Dowling's Practice Cases. 9 vols.
Dr. ....	Drewry's Reports. 4 vols.
Dr. & Sm. ....	Drewry and Smale's Reports. 2 vols.
Drew. Ch. P. ....	Drewry's Practice of the Court of Chancery.
E. & B. ....	Ellis and Blackburn's Queen's Bench Reports. 8 vols.
Eq. Cas. ....	Equity Cases (Law Reports).
Esp. ....	Espinasse's Nisi Prius Reports. 6 vols.
Evans, Ch. Pr. ....	{ The Practice of the Supreme Court of Judicature. Chancery Division. By Frank Evans. (H. Cox, 1881.)
Fearn, Cont. Rem.....	Fearn's Contingent Remainders, &c.
Flath. Arch. Bk. ....	Archbold's Law of Bankruptcy by Flather.
Gold. Eq.....	Goldsmith's Doctrine and Practice of the Court of Equity.
Gray's Costs .....	Gray's Law of Costs.
Green. Conv. ....	Greenwood's Practice of Conveyancing.
H. & C. ....	Hurlestone and Coltman's Reports, Exchequer. 4 vols.
H. & N. ....	Hurlestone and Norman's Reports, Exchequer. 7 vols.
Hal. Conc. Conv. ....	Hallilay's Concise Conveyancing.
Hal. Suit.....	Hallilay's Elementary View of a Suit in Chancery.
Hal. Handbook .....	Hallilay's Articled Clerk's Handbook.
Hallam's Const. Hist. Eng.	Hallam's Constitutional History of England.
Hawkins on Wills .....	Hawkin's Concise Treatise on the Construction of Wills.
Hayes and Jarm. Conc. Wills	{ Hayes and Jarman's Concise Forms of Wills, by East- wood, with Notes.
Haynes' Out. Eq. ....	Haynes's Outlines of Equity.
Holth. L. D. ....	Holthouse's Law Dictionary.
Hughes' Conv. ....	Hughes' Practice of Conveyancing.
Hughes' Pract. Sales.....	Hughes' Practice of Sales of Real Property.
J. & H. ....	{ Johnson's and Heming's Reports in court of Wood, V.C. 2 vols.
Jac. ....	Jacob's Reports, Chancery. 1 vol.
Jarm. Conv. ....	Jarman's Precedents in Conveyancing, by Sweet.
Jarm. Wills.....	Jarman on the Law of Wills, &c.
Jur. ....	Jurist Reports. 31 vols.
K. & J. ....	{ Kay and Johnson's Reports of decisions of Wood, V.C. 4 vols.
L. C. Conv.....	Leading Cases in Conveyancing, by Tudor.
L. C. Eq.....	Leading Cases in Equity, by White and Tudor.
Ld. St. Leonards' Handy Book .....	{ Lord St. Leonards' Handy Book of Property Law.
Leg. Ob. ....	Legal Observer.
Lewin on Trusts .....	Lewin on the Law of Trusts and Trustees.
Lindley, Part. ....	Lindley on the Law of Partnership.
Lit. Ten.....	Littleton's Tenures.
L. J. Rep. ....	Law Journal Reports.
L. Rep. ....	Law Reports.
L. T. Rep. ....	Law Times Reports.
M. & W. ....	Meeson and Welsby's Reports, Exchequer. 16 vols.
Mac. & G. ....	Macnaghton and Gordon's Reports, Chancery. 3 vols.
Madd. ....	Maddock's Reports, Vice-Chancellor's Court. 6 vols.
Matt. Exors. ....	{ Matthew's Practical Guide to Executors and Adminis- trators.
Marsh. Costs .....	Marshall's Law of Costs.
Mer.....	Merivale's Reports, Chancery. 3 vols.
Myl. & Cr. ....	Mylne and Craig's Reports, Chancery. 3 vols.
Myl. & K. ....	Mylne and Keene's Reports, Chancery. 3 vols.





Whart. Law Lex. ....	Wharton's Law Lexicon.
Will. R. P. ....	Williams on the Law of Real Property.
Will. P. P. ....	Williams on the Law of Personal Property.
Wils. ....	{ Wilson's Reports, King's Bench and Common Pleas, 3 vols.
Wms. Exor.....	Williams on the Law of Executors.
Wood. L. & T.....	Woodfall's Law of Landlord and Tenant, by Cole.
Y. & C.....	{ Younge and Collyer's Reports, Vice-Chancellor's Court. 2 vols.

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# A DIGEST

OF THE

## FINAL EXAMINATION QUESTIONS AND ANSWERS.

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### PRINCIPLES OF LAW AND PROCEDURE.

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IN MATTERS AS ADMINISTERED UNDER THE USUAL JURISDICTION  
OF THE QUEEN'S BENCH DIVISION OF THE HIGH COURT OF  
JUSTICE.

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#### OF THE COMMON AND STATUTE LAW.

**Question.**—Give some explanation of the words “Common and Statute Law.”

**Answer.**—The term “Common Law” is generally used to distinguish that part of our law which obtains its force from immemorial usage or custom, termed the *lex non scripta*; also to distinguish that department of law which was till recently administered in the Superior Courts of Common Law at Westminster. The statute law is termed the *lex scripta*, embracing the express enactments of our Parliament: (see Holth. L. D. 2nd edit. ; 1 St. C. Intr. s. 3.)

**Q.**—State some of the leading Acts of Parliament relating to common law passed during the last five years.

- 42 Vict. c. 11 (Bankers' Books Evidence Act).
- 42 & 43 Vict. c. 76 (Joint Stock Companies Amendment Act).
- 43 & 44 Vict. c. 41 (Burials Act).
- „ c. 42 (Employers' Liability Act).
- „ c. 47 (Ground Game Act).
- 44 & 45 Vict. c. 44 (Solicitors' Remuneration Act).
- „ c. 60 (Newspapers (Law of Libel) Act).
- „ c. 68 (Supreme Court of Judicature Act).
- 45 & 46 Vict. c. 43 (Bills of Sale Amendment Act).
- „ c. 61 (Bills of Exchange Act).
- „ c. 75 (Married Women's Property Act).
- 46 & 47 Vict. c. 57 (Patent Law Amendment Act).
- „ c. 61 (Agricultural Holdings Act).

**Q.**—Suppose a statute passed repealing a former Act, and such statute becomes itself repealed, does the former Act become revived?

**A.**—Formerly, in such a case, the former Act would have been revived; but now it is provided, by the 13 & 14 Vict. c. 21, that where any Act repealing in whole or in part any former Act is itself repealed, such last repeal shall not revive the Act or provisions before repealed, unless words be added for that purpose: (ss. 5, 6.)

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## THE LAW OF CONTRACTS.

### 1. *Of the various Descriptions and Requisites, and General Nature of Ordinary Contracts.*

**Q.**—How many and what descriptions of contracts are there? Give shortly a definition of each.

**A.**—Contracts are of three descriptions—1. Contracts of record; 2. Specialties; 3. Simple contracts.

Contracts of record consist of judgments, recognisances and statutes staple.

Contracts under seal or specialties, such as deeds or bonds, are instruments which must not only be in writing but sealed by the party bound thereby, and delivered by him to or for the benefit of the person to whom the liability is incurred.

Simple contracts not only include such as are verbal, but also all those which, although reduced into writing, have not been sealed and delivered: (Chit. Cont. pp. 2, 3, and 4, 11th edit.)

**Q.**—What evidence is required to support an action on a contract by matter of record?

**A.**—It is generally proved by production of the record itself: (Chit. Cont. 2, 11th edit.)

**Q.**—What is a bond? Describe a common money bond.

**A.**—A bond is a deed whereby a person binds or obliges himself, his heirs, executors, and administrators, to do any act within a certain time. There is usually also added what is termed a *condition*, which is simply a statement that on the person bound doing the act the bond shall become void. A common money bond acknowledges that the obligor is bound to the obligee in *double* the amount of the debt. The condition states that on payment of the sum really due, with interest, on a certain day the bond is to become void: (2 St. C. 106, 8th edit.)

**Q.**—Define a simple contract; and mention briefly what are its chief requirements irrespective of statute law.

**A.**—A simple contract is an agreement, either in writing not under seal, or verbal, to do or not to do some act. Irrespective of statute law it requires (1) the mutual assent of two or more persons able to contract; (2) a valuable consideration, which must not be illegal or immoral; (3) something to be done or omitted which is the subject of the contract: (2 St. C. 53, 8th edit.; Chit. Cont. 8, 11th edit.)

**Q.**—What is the difference between simple contract and specialty debts? (a)

**A.**—Simple contract debts are such as arise by writing, not under seal, or by mere oral evidence. Specialty debts are such as have become due by instrument under seal. Again, the former are not valid unless founded on a sufficient consideration, and do not, when in writing (with the exception of bills and notes), import a consideration; but the latter are binding on the parties executing, although there be no consideration for making them. So simple contract debts are statute barred after six years, specialty debts not until twenty years: (2 St. O. ch. v., and see *infra*.)

**Q.**—Has a specialty debt any priority over a simple contract debt in the respective events of the bankruptcy or the death, leaving an insolvent estate, of the debtor?

**A.**—In the event of bankruptcy of the debtor a specialty debt has no priority over a simple contract debt. In the administration of legal assets, however, a specialty debt formerly had priority over a simple contract debt. But with respect to the administration of the estates of persons dying on and after 1st January, 1870, they now rank equally: (32 & 33 Vict. c. 46; Will. P. P. 120, 128, 10th edit.) (b)

**Q.**—What is an executory contract?

**A.**—One that is to be executed at a future time, as, if A. and B. agree to change horses next week; in such case the right only vests, the property not being in possession, but in action only: (2 St. O. 57, 8th edit.)

**Q.**—A. contracts with B. to do something on a future day, but before that day arrives states his intent not to do it; can B. sue A. before the day for the performance of the contract, or must he wait till after that day?

**A.**—If A. expressly renounces the contract, B. may treat this as a breach, and may sue A. at once: (see *Hochster v. De la Tour*, 2 E. & B. 678; Chit. Cont. 664, 11th edit.) (c)

**Q.**—What is an express, and what an implied contract? And give an instance of each.

**A.**—An express contract is one in which the terms of the agreement are openly expressed or uttered at the time of the making thereof, while an implied contract is one which rests merely on construction of law, and where there is strictly speaking no agreement of the parties to the terms by which they are bound. An instance of an express contract is an agreement in writing or verbally to employ a servant or clerk to do certain work at certain wages, whilst an implied one arises if I employ a person to do any work for me without an agreement as to payment, the law

(a) This question has also been asked in the Conveyancing Division.

(b) By 38 & 39 Vict. c. 77, s. 10, the rules of bankruptcy are now to prevail in the administration of estates of deceased persons dying after the passing of that Act, so far as regards proof of debts and valuation of annuities and liabilities.

(c) It was decided in *Frost v. Knight* (26 L. T. Rep. N. S. 77), reversing a judgment of the Exchequer, that in such a case an action may be maintained upon a breach of promise of marriage before the time for performance arrives.

there implying that I undertake to pay him a reasonable sum : (see Chit. Cont., 11th edit., chap. 1, ss. 1 and 2).

*Q.*—What is meant by the term “privity of contract?” and in what cases may the assignee of the lessor sue the assignee of the lessee?

*A.*—Privity of contract is that connection of relationship which exists between two or more contracting parties. It exists between lessor and lessee; but not between lessor and an assignee of the term; for here there is only a privity of *estate*. The assignee of the lessor may sue the assignee of the lessee on all the covenants running with the land, if there be any breach of such covenants by the latter while he remains in possession : (see *Spencer's case*, 1 Sm. L. O.)

*Q.*—How are contracts divided with reference to evidence?

*A.*—This question is somewhat ambiguously framed. Contracts with respect to evidence may be said to be divided into contracts in writing and contracts not in writing, and as to contracts in writing, those which are under seal and those not under seal. It is a rule that parol evidence cannot be received to contradict, vary, add to, or subtract from the terms of a valid written instrument. Also that a deed cannot be altered, or the liability created by it lessened or discharged by simple contract : (see Add. Cont. 388, &c., 4th edit.)

*Q.*—Distinguish between a patent and a latent ambiguity in a written instrument. State the effect of each as regards parol evidence to explain the ambiguity. Illustrate your answer by an instance in each case.

*A.*—A patent ambiguity is where the doubt arises upon the face of the instrument itself, as in case of a blank. Latent where the doubt is introduced by the existence of a fact not apparent upon the face of the deed, as a devise or grant of the “manor of A.,” the party having two manors of that name. Parol evidence is admissible to explain a latent ambiguity, but not a patent one : (Chit. Cont. 104, 11th edit.)

*Q.*—Explain the meaning of the word “consideration” when applied to contracts. What contracts are called *nudum pactum*? Is there any difference as to the liability on the latter species of contract when entered into by deed and by instrument under seal?

*A.*—The consideration of a contract is the price or motive of the contract. Considerations are divided into (1) *good*, as natural love and affection, and (2) *valuable*, as money or marriage. The former will support a deed, which imports a consideration, but not a simple contract, as that requires a valuable consideration to give it force, and if this be wanting it is termed *nudum pactum*, upon which no action lies, the maxim being *Ex nudo pacto non oritur actio* : (a) (see Chit. Cont. 17 *et seq.*, 11th edit.)

*Q.*—Translate and give an instance of the maxim “*Ex turpi causâ non oritur actio*.”

*A.*—“No action arises out of an unlawful agreement.” The rule

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(a) Valuable considerations are divided into four : (1) *do ut des*, (2) *facio ut facias*, (2) *facio ut des*, (4) *do ut facias*; and as to time they are : (a) executed, (b) executory, (c) concurrent, and (d) continuing.

expressed by this well-known maxim applies not only where the contract is expressly illegal, but wherever it is opposed to public policy or founded on an immoral consideration. A leading case is *Collins v. Blantern*, where a bond given for the suppression of a prosecution was held void: (Broom's Legal Maxims, 5th edit. 732; 2 Sm. L. C. 8th edit. 547.)

**Q.**—A. obstructs a highway so as to cause special inconvenience to B., and B. promises A. to pay him 5*l.* for removing the obstruction. Give the short reason for deciding whether this promise is binding or not.

**A.**—The promise is not binding for the reason that there is no valid consideration for it, A. being bound to remove the obstruction without being paid for doing so.

**Q.**—For what debts is an infant liable? Does it make any difference if he is residing under the parental roof?

**A.**—He is liable for necessaries suitable to his station in life, supplied to him without fraudulent intention on the part of a tradesman: (*Ryder v. Wombwell*, L. Rep. 4 Ex. 32.) At least, this is so if the infant is an orphan or residing at a distance from his parents, and is not provided with necessaries under their superintendence. But an infant living under the parental roof cannot in general be made responsible for the payment of the price of clothes or other real necessities of life: (Chit. Cont. 139 *et seq.*, 11th edit.)

**Q.**—State the common law liability of infants on contracts made by them, and how it has been recently limited by statute.

**A.**—An infant at common law is liable only on contracts for necessaries; his other contracts were voidable and might be confirmed on coming of age. But by 37 & 38 Vict. c. 62, all contracts by infants for money or goods other than necessaries, and all accounts stated are absolutely void where formerly voidable, and cannot be ratified after full age.

**Q.**—What are “necessaries,” and does the court take into consideration the position of the parties?

**A.**—Parke, B., in *Peters v. Fleming* (6 M. & W. 46), says: “From the earliest time down to the present the word ‘necessaries’ is not confined in its strict sense to such articles as are necessary to the support of life, but is extended to articles fit to maintain the particular person in the state, degree, and station in life in which he is. It is for the court to say whether the things supplied are *prima facie* necessaries. In case of an infant, board, lodging, clothes, medicine, and education are necessaries.”

**Q.**—Is a father liable for any debts contracted by his infant son?

**A.**—He is not liable to pay for goods, whether necessaries or not, furnished to his infant son, without some proof of a contract on his part, express or implied: (Chit. Cont. 150, 11th edit.) The general duty of a parent to maintain his infant child only lasts so long as the child is unable to work. And this liability arises under the poor-law system: (Steph. Lush. Pr. 40, n.)

**Q.**—Is there any liability imposed by the common law on a parent to provide for the maintenance and education of his child?

**A.**—Parents may be compelled to provide their legitimate children, of



whatever age, with necessaries when the children are in poverty, or when through infancy, disease, or poverty, they are unable to support themselves. And very slight circumstances will be sufficient to raise, on action brought, the presumption of a contract on the part of the parent to pay for necessaries provided to his infant children: (2 St. C. 292, 8th edit.) Prior to the Elementary Education Act (33 & 34 Vict. c. 75) parents could not be compelled to provide education for their children; but this Act has rendered the attendance of children at school compulsory.

**Q.**—Can a minor sue or be sued on a breach of a promise to marry? State the reasons for your answer.

**A.**—He cannot be so sued, although he or she may sue a person of full age on such breach; for it is a general rule that infancy is a personal privilege, of which no one can take advantage but the infant; and that therefore, though the infant may avoid the contract, it shall bind the adult party: (Chit. Cont. 154, 11th edit.) (a)

**Q.**—Is an infant liable on a warranty of a horse sold by him if the horse is unsound?

**A.**—No; for it is a breach of duty arising out of contract: (see Chit. Cont. 148, 11th edit.; and see *Burnard v. Haggis*, 8 L. T. Rep. N. S. 320.)

**Q.**—Can an infant ratify a contract made by him during infancy on his coming of age? Give a reason for your answer.

**A.**—Sect. 2 of the Infants' Relief Act, 1874, now provides that *no action* shall be brought upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration therefor. See *Coxhead v. Mullis* (47 L. J. 76, O. P.); and *Ditcham v. Worrall* (49 L. J. 688, Q. B.), where it was held that a contract to marry is within the Act, and is incapable of ratification after full age. (b)

**Q.**—Against whom should an action be brought for a debt contracted by a married woman before her marriage? and state what restriction, if any, there is to the liability of a husband to the debts of his wife contracted before marriage. And what is the effect if she dies before action brought?

**A.**—If the marriage took place before the 9th August, 1870 (if after, see next answer), the action must be brought against husband and wife; for during the coverture the husband is liable *jointly* with his wife upon all the contracts entered into by her *before* the marriage, however improvident, even if he had no fortune with her. But upon her death he is no longer liable as husband; and unless he administer to her *choses in action* not reduced into possession in her lifetime, he cannot be sued at all; if

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(a) This question is answered by the above: Can any other party to a contract except an infant take advantage of infancy to defend an action on the contract?

(b) Ratification was of two kinds, according to the kind of contract entered into. Some contracts were *valid unless rescinded*, others *invalid until ratified*. It can hardly be supposed that such an implied ratification as continuance in a partnership or retention of shares would be affected by the provisions of the section (see Anson, Contracts, 2nd edit., pp. 108, 110).

he administer, however, he will be liable to the amount of the sums received by him on account of the *choses in action*, but not further, even though he received a large property with his wife: (Ohit. Cont. 157, 11th edit.)

**Q.**—Is a man liable to be sued for debts of his wife contracted before marriage? Has any and what alteration in the law on this point been recently made?

**A.**—He is liable as above stated unless the marriage took place between the 9th August, 1870, and 30th July, 1874, when, by the 33 & 34 Vict. c. 93, s. 12, he is not liable for the debts of his wife contracted before marriage. The wife, however, may be sued, and her separate estate is liable, and now by 37 & 38 Vict. c. 50, if married after the 30th July, 1874, he is liable to the extent that assets of the wife have or might have come to his hands; and by 45 & 46 Vict. c. 75, s. 14, if married after the 31st December, 1882, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife.

**Q.**—If a man marry a woman to whom he is indebted, and to whom he has given a security for the debt, what becomes of the debt and of the security; and how can this be prevented?

**A.**—At law, and in equity also, as a rule, the debt and security were discharged by the marriage. To prevent this the debt should, before the marriage, be assigned to trustees for the separate use of the wife, free from the control of the husband, and the security should be deposited with the trustees: (Co. Lit. 264 *b.*; St. Eq. §§ 1370, 1371.) If married after 1882 this will be unnecessary: (45 & 46 Vict. c. 75, s. 2.)

**Q.**—When is a husband liable for the debts of his wife contracted during coverture, and upon what principle; and in what case is he not liable?

**A.**—He is liable upon his wife's contract for necessities suitable to his station in life, upon the principle of her being his agent, if they be living together; unless indeed the particular tradesman had notice not to trust her. And he is in general liable for necessities even after a separation, if no provision be made for her, though the tradesman has notice not to trust her.

But if the wife depart from her husband against his will, and without sufficient excuse, or if she is dismissed by him for adultery, the husband incurs no such liability. Nor, if husband and wife are living separate, and he *pays* her a sufficient sum for her maintenance, even if the tradesman did not know of such allowance: (see *Manby v. Scott*, 2 Sm. L. C.; *Montague v. Benedict*, *ib.*; *Seaton v. Benedict*, *ib.*, and notes thereto; 2 St. C. 268 *et seq.*; 8th edit.)(a)

**Q.**—How can the presumption involved in this principle be rebutted?

**A.**—The presumption may be rebutted by proof that he had forbidden her to take up goods on his credit (*Jolly v. Rees*, 33 L.J. 177, O.P.), or

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(a) This question is answered by the above: Upon what principle does the liability of the husband upon his wife's contract rest, and in what case may a wife be regarded as the general agent of the husband?

that although he saw some of the goods which his wife had ordered, he disapproved of her conduct in ordering them; or by showing that the wife was already sufficiently provided with clothes, so that there was no necessity for her ordering the goods in question, and no implied authority from her husband to order them: (Chit. Cont. 162, 11th edit.)

**Q.**—Does it make any difference, or not, as to the husband's liability for necessities supplied to his wife, if he be an infant at the time?

**A.**—A husband is liable for necessities supplied to his wife, although he be an infant at the time: (*Turner v. Trisby*, 1 Str. 168; Chit. Cont. 142, 11th edit.)

**Q.**—Is a wife's authority to order necessities revoked by the death of her husband, although at the time of the order the wife and tradesman were ignorant of the death of the husband?

**A.**—Yes; for as the wife's power to bind her husband is founded on the presumption of authority, it follows that the husband's death revokes her authority; and she then ceases to have power to bind his estate *in futuro*: (*Smout v. Ilberry*, 10 M. & W. 1; Chit. Cont. 163, 11th edit.)

**Q.**—A butcher supplies A. with meat. A. goes abroad, leaving his wife (who had always conducted his house) at home; and, shortly after, dies. The butcher does not hear of his death for two months, but continues to supply the house. At A.'s death the butcher's bill was 20*l.* Two months after, no payment having been made, it was 30*l.* What are the butcher's rights, and against whom?

**A.**—In *Smout v. Ilberry* (10 M. & W. 1) it was held in a similar case to this that neither the husband's estate, nor the wife personally, would be liable for the goods supplied after the death. The butcher's claim would therefore be limited to the 20*l.*, and he might bring an action against the executor or administrator to recover that amount. If, however, the wife knew of the death, she would make herself personally liable for the remainder.

**Q.**—When a husband wrongfully turns away his wife, and gives notice in the newspapers not to trust her, is he liable to tradesmen for necessities supplied to her?

**A.**—The husband is still liable; for the tradesmen are considered as standing in the place of the wife and enforcing indirectly her right to be maintained: (Selw. Nisi Prius, 294, 11th edit.; Chit. Cont. 170, 11th edit.)

**Q.**—What rights as to property have been conferred by recent legislation upon wives deserted by their husbands, and how may they be secured?

**A.**—By the Divorce Act, the wife may apply to a police magistrate (if one), or to justices at petty sessions, or to the Divorce Court, for an order to protect any money or property she becomes possessed of after such desertion (a) against her husband and his creditors, &c. And if the order

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(a) This does not protect property acquired after the desertion by *immoral* practices: (*Mason v. Mitchell*, 3 H. & C. 528.)

be made such money or property belongs to the wife as if she were a *feme sole*. The order must, unless made by the court, be entered within ten days after with the registrar of the proper County Court. If the husband (or his creditors, &c.) seize and hold the property after notice of the order, he is liable to restore the property, and pay double its value: (20 & 21 Vict. c. 85, s. 21.)(a)

*Q.*—Name the contracts required by the fourth section of the Statute of Frauds to be in writing.

*A.*—In the following cases the 4th section of this statute requires that there shall be some note or memorandum of the agreement in writing, signed by the party to be charged therewith, or his lawful agent, before any action can be brought upon the agreement:

1. Where an executor or administrator promises to answer damages out of his own estate.

2. Where a person undertakes to answer for the debt, default, or miscarriage of another.

3. Where any agreement is made upon consideration of marriage.

4. Where any contract is made of lands, tenements, or hereditaments, or any interest therein.

5. Where there is any agreement that is not to be performed within a year from the making thereof: (29 Car. 2, c. 3, s. 4; 2 St. O. 54, 8th edit.)

*Q.*—When a simple contract is required by the Statute of Frauds to be in writing, or is reduced into writing by the parties, is it necessary that the consideration should appear on the agreement, or may it be supplied by parol testimony?

*A.*—It is necessary—except in the case of a guarantee, a bill of exchange, or a promissory note—that the consideration should appear on the face of the written contract, and it cannot be supplied by parol testimony, and this whether the agreement is required to be in writing by the Statute of Frauds or not; for the whole of the agreement must be contained in the writing: (Chit. Cont. 64, 11th edit.; *Wain v. Warlters*, 2 Sm. L. O. 251; 19 & 20 Vict. c. 97, s. 3. But see *Egerton v. Matthews*, 6 East, 307.)

*Q.*—Can an action be maintained on a verbal contract for a year's service to commence from a day subsequent to the making of the contract? Would it make any difference if the year were to commence from the making of the contract?

*A.*—In the first case given no action lies; as contracts which cannot be performed within a year from the making cannot be sued upon unless in writing signed by the party to be charged, or his lawful agent: (29 Car. 2, c. 3, s. 4; *Peter v. Compton*, 1 Sm. L. O. 351; Chit. Cont. 71, 11th edit.) The latter case is not within the statute, and, therefore, an action may be brought: (*Peter v. Compton*, *sup.*, in notes; Chit. *sup.*)

*Q.*—Are these agreements respectively valid or not?

(a) An agreement to sell "one hundred tons of oil" without anything to show what kind of oil is intended.

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(a) See also stats. 21 & 22 Vict. c. 108, ss. 7-10; 27 & 28 Vict. c. 44.

(b) An agreement by a dealer in palm oil only, to sell "one hundred tons of oil."

A.—In the first case the agreement would not be valid, it being uncertain what description of oil was the subject-matter of the contract; in the last it would be otherwise, as the agreement must be understood to refer to that oil in which the party solely dealt, viz., palm oil; but there is no direct authority on the point.

Q.—State some of the maxims by which contracts are construed or expounded.

A.—1. All contracts are construed according to the intention of the parties. 2. The construction should be liberal. 3. It should be favourable. 4. The contract should, in general, be construed according to the law of the country where made. 5. The construction is taken most strongly against the contractor or grantor. 6. Oral testimony cannot be given to vary, but may to explain, a written contract: (see Chit. Cont. 72, *et seq.*, 11th edit.)

Q.—What is the general rule as to the law according to which contracts are expounded? If a contract to be performed in a foreign country be made in England, according to the law of which country will it be construed?

A.—Contracts are generally expounded according to the law of the country where they are made (*lex loci contractus*), except where the parties at the time of making the contract had a view to a different kingdom, for contracts are also to be considered according to the place where they are to be executed. A contract to be performed in a foreign country would be construed according to the law of that country (*lex loci solutionis*): (Chit. Cont. 92 *et seq.*, 11th edit.; see *P. and O. Co. v. Shand*, 3 Moo. P. O. N. S. 272.)

Q.—Explain the meaning of the maxim *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*, and give an instance of its application.

A.—The maxim means that the subsequent assent or recognition of a person for whom another professes to act is equivalent to a previous authority. Thus, where A. and B. were jointly interested in a quantity of oil, and A. entered into a contract for the sale of it without the authority or knowledge of B., who upon receiving information of the circumstance refused to be bound by it, but afterwards assented, and samples of the oil were delivered to the vendees, it was held that B.'s subsequent ratification of the contract rendered it binding upon him: (Chit. Con. 16, 11th edit.)

Q.—Will a moral obligation be sufficient to support an express promise where no legal liability ever existed?

A.—No; courts of law do not take upon themselves to enforce moral obligations where no legal liability ever existed: (see *Beaumont v. Reeve*, 8 Q. B. 483; Chit. Cont. 37, 11th edit.)

Q.—Can you question the legality of a consideration to a contract under seal?

A.—Although, as a general rule, a contract when under seal is binding

on the party making it, whether there be a consideration or not, yet all deeds are liable to be impeached if founded on illegal or immoral considerations, or if obtained by fraud: (see *Collins v. Blantern*, 1 Sm. L. C. 387; Will. P. P. 101, 10th edit.)

Q.—Can money won by a wager be recovered in an action?

A.—No; this being prohibited by the 8 & 9 Vict. c. 109, s. 18. This Act does not extend to money subscribed or contributed for any plate or prize, &c., to be awarded to the winner of any lawful game, sport, &c.: (see Will. P. P. 105, 10th edit.)

Q.—Are bonds, notes, or bills given to secure money lost at play at unlawful games altogether void, or may they be enforced under any and what circumstances?

A.—They are not altogether void, but are to be taken to have been given for an illegal consideration, and may be enforced in the hands of an innocent holder, to whom they may have been transferred without notice of the illegal consideration: (5 & 6 Will. 4, c. 41; Will. P. P. 105, 10th edit.)

Q.—Can a contract between certain master manufacturers, whereby they mutually bind themselves to close their works at the will of a majority, be enforced? State the reason.

A.—No; such a contract is void, being in restraint of trade and against public policy: (see *Chit. Cont.* 616, 11th edit.; *Hilton v. Eckersley*, 6 E. & B. 47, 73.)

Q.—What is the law with reference to contracts entered into on Sunday?

A.—By the 29 Car. 2, c. 7, s. 1, it is enacted that no tradesman, artificer, workman, labourer, or other person whatsoever (*ejusdem generis*) shall do or exercise any worldly labour, business or work of their ordinary callings upon the Lord's Day, or any part thereof (works of necessity and charity only excepted). But a sale on Sunday which is not in the exercise of the ordinary calling of the vendor or agent is not void at common law or by the above statute: (*Chit. Cont.* 393, 11th edit.)

Q.—If A. has covenanted to do one of two things, and the performance of one of them is rendered impossible by the act of God, is A. discharged from liability to do the other?

A.—Not as a rule; for where a contract is in the alternative, and one branch of the alternative cannot be performed, the promiser is bound to perform the other: (see 3 Pet. Abr. 168, 2nd edit.; *Chit. Cont.* 660, 11th edit.)

Q.—Under an agreement to perform one of two things, in whom does the right of electing what shall be done rest?

A.—In the promiser; the rule being that, in case an election be given to do several things, he that is the first agent, and who ought to do the first act, shall have the election: (*Chit. sup.*)

Q.—What is an *estoppel*? Give examples.

A.—A man is sometimes precluded in law from alleging or denying a fact, in consequence of his own previous act, allegation, or denial to the



contrary; and this preclusion is called an *estoppel*. It may arise either (1) from matter of *record*, such as a fine or recovery; or (2) from the deed of the party, as, if the deed recites a fact, the party averring it cannot afterwards deny that fact; or (3) from matter *in pais*, i.e., matter of fact, as if an infant makes a lease and accepts rent after he comes of age: (Holt. Law Dict. 2nd edit.; Co. Lit. 352, a.)

Q.—Mention the different kinds of bailments, and the extent in each case of the bailee's liability.

A.—1. *Depositum*, which is a naked bailment without reward.

2. *Mandatum*, where the bailee undertakes without recompense to do some act about the thing bailed. In these cases the bailee is liable for gross neglect only.

3. *Commodatum*, or loan for use, when goods are bailed without pay, to be used for a certain time by the bailee, such bailee is liable for negligence, gross want of skill, and above all for anything that may be qualified as legal fraud.

4. *Pignori acceptum*, which is where a thing is bailed by a debtor to his creditor in pledge, and such bailee is liable for ordinary neglect.

5. *Locatum*, or hiring, which is always for hire, which is divided into three heads, and in this case generally speaking the bailee is liable for ordinary neglect: (Chit. Cont. 434 *et seq.*, 11th edit.)

Q.—How should a person who has delivered goods to a common carrier to carry and deliver, but which have not reached their destination, proceed for the recovery of damages?

A.—He should now bring an action in the High Court of Justice; formerly he proceeded either by action of *assumpsit* or on the case, so *detinue* might be brought, and where the carrier had been guilty of a *misfeasance*, which amounted to a conversion, *trover* might have been maintained: (1 Arch. Nisi Prius, 59, 393, 538, 576.)

Q.—State the instances, if any, in which a carrier is not liable for the loss of goods entrusted to him, and for what losses he is liable; and how does his liability vary with respect to passengers?

A.—He is not liable for a loss arising from the act of God, or of the Queen's enemies. In other cases, even his entire faultlessness does not excuse him; thus he is liable for damage done by accidental fire or by a robbery. The 1 Will. 4, c. 68, however, protects a common carrier by land from being liable for any loss or injury to any gold or silver coin, or gold or silver manufactured or unmanufactured, or any precious stones, jewellery, watches, clocks, timepieces, trinkets, bills, notes, or securities for money, stamps, maps, writings, title deeds, paintings, engravings, pictures, plate, glass, china, silk, furs, or lace, (a) contained in any parcel where the value exceeds 10*l.*, unless at the time of the delivery to the carrier their value and nature be declared, and the agreement made to pay the extra charge for them. But this statute does not protect the carrier from any loss arising from the *felonious* act of any servant in his employ: (see 2 St. O. 87, 8th edit.; Chit. Cont. 449, 464, 11th edit.) He is liable for personal

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(a) But not machine-made lace (28 & 29 Vict. c. 94).

injuries which the passengers may sustain whilst being carried by him only where such injuries have been occasioned by his negligence or unskilfulness : (Chit. Cont. 469, 11th edit.)

*Q.*—In what case is a common carrier liable for the loss of a package which he undertakes to carry gratuitously ?

*A.*—Although a common carrier for hire is an insurer of the goods he carries, the duties and liabilities of carriers without hire are only co-extensive with that of mandatory bailees. They are bound to employ but moderate or slight diligence, and are only liable for loss or damage occasioned by gross or culpable negligence : (see *Coggs v. Bernard*, 1 Sm. L. C., *in notis.*)

*Q.*—What is the difference in the common law liability of a carrier in respect of goods and passengers carried by him ?

*A.*—A carrier of goods is in the nature of an insurer, as stated *supra*.

*Q.*—Does the same liability for loss or injury extend to carriers by railway, or by water ?

*A.*—By the Railway and Canal Traffic Act (17 & 18 Vict. c. 31) the company is liable for loss or injury to cattle or goods occasioned by the neglect or default of the company or its servants, notwithstanding any notice, condition, or declaration by such company contrary thereto, or in anywise limiting their liability. But they may limit their liability by express condition, to be approved by the judge who tries the cause. It is also declared that no greater sum shall be recovered for a horse than 50*l.*, neat cattle per head 15*l.*, sheep and pigs 2*l.* per head, unless when such cattle are delivered to the company they are declared to be of a higher value, in which case a higher rate may be charged for carriage. Special agreements are not affected by this Act. So the stat. 1 Will. 4, c. 68, applies to railways.

As to ships : at common law the owner was liable for any loss or injury unless arising by the act of God or the Queen's enemies, if this liability were not narrowed by the charter-party or bill of lading. But by several statutes the owner or *master* is not liable for loss or injury occasioned by the fault of a qualified pilot where it is compulsory by law to employ such pilot. And the owner of any sea-going ship is not liable for loss or injury to goods on board arising from accidental fire ; nor for robbery, &c., of precious articles, unless the owner, in writing, declares their nature and value at the time of shipment. Nor is the owner of any ship liable for accidental loss or damage to goods, &c., on board, to a greater aggregate amount than 8*l.* per ton of the ship's tonnage : (Sm. M. L. 313, 317, 7th edit.)(*a*)

*Q.*—A railway company receives goods as common carriers and loses them. What must they show in order to establish a defence that the goods were "valuables" within the Carriers Act, 1 Will. 4, c. 68 ?

*A.*—That the goods came within those specified in the Act. That they were over the value of 10*l.* That the extra value was not declared at the time of delivery and an extra rate paid, and that the notice required by

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(*a*) In case of collision through mutual negligence each must bear half the total loss : (36 & 37 Vict. c. 66, s. 25.)



the 2nd section of the Act was affixed in some conspicuous part of the office, &c. : (see Chit. Cont. 460-1, 11th edit.)

**Q.**—If a railway accident happen by breaking of a tire, state what the railway company would have to prove in order to escape liability for an injury to a passenger; and state whether they could escape from liability for the destruction of a parcel of groceries (received by them as common carriers) in the same accident.

**A.**—To escape liability to a passenger the company must prove that the carriage was examined previously to starting, that the defect was invisible, and that the accident could not reasonably have been prevented: (*Red-head v. Midland Railway Company*, 2 Q. B. 412.) They will be responsible for the goods, as common carriers are in the nature of insurers.

**Q.**—What is the law relating to the liability of innkeepers, and what is the leading case on the point; and how has this been affected by a recent statute?

**A.**—At common law an innkeeper is liable for the loss of or injury to his guest's goods to their value, unless lost, &c., by the act of God or the Queen's enemies, or the fault of the guest or his servant, as where stolen from the person of the guest, or by his friend or servant, or if stolen from a room which he occupied other than as guest, &c. : (see *Calye's case*, 1 Sm. L. C. 131.) But by the 26 & 27 Vict. c. 41, the innkeeper's liability for his guest's goods (not being a horse or other live animal, or gear appertaining thereto, or any carriage) is restricted to 30*l.*, unless (1) lost, &c., through the wilful neglect of the innkeeper or his servants; or (2) unless the goods were deposited with him for safe custody: (s. 1.) To take advantage of the Act, the innkeeper must exhibit (conspicuously) in his house the above section: (s. 3.)

**Q.**—Where a traveller is preparing to depart from an inn without paying his bill, may the landlord detain either his person or baggage until payment?

**A.**—An innkeeper cannot detain the person of his guest until payment of his bill, but he has a lien on goods intrusted to his charge by his guest, and may detain them, though they belong to another (see Sm. M. L. 559 and note, 7th edit.; 2 St. C. 84, 8th edit.); and now by 41 & 42 Vict. c. 38, he may by public auction dispose of any goods, &c., left with him for six weeks, on advertising one month before such sale in one London and one country newspaper a description of the goods with the name of the owner or person who left them when known.

**Q.**—Has an innkeeper the right to retain the goods of a guest in order to enforce the payment of damages claimed by reason of the guest having had scarlet fever in the house?

**A.**—No; his lien is only for his general account, and would not include a claim for damages: (see *Mulliner v. Florence*, 47 L. J. 700, Q. B.)

**Q.**—Has an innkeeper, in addition to his ordinary lien, any right to sell the goods deposited with him or left in the inn or upon the premises kept by him where the person depositing or leaving such goods is indebted to him for board or lodging or for the keep of any horse or other animal? If

so, how, when, and in what manner can such right be exercised? Refer to any recent legislation on the subject.

A.—He may, in addition to his ordinary lien, have the right absolutely to sell and dispose, by public auction, of any goods, chattels, carriages, horses, wares, or merchandise, which may have been deposited with him or left in the house he keeps. Provided that no such sale shall be made until after the said goods, &c., shall have been in his custody for six weeks; and he must advertise such sale one month previously in one London and one country newspaper: (41 & 42 Vict. c. 38.)

Q.—A traveller on his journey stops at an inn, and desires to put up for the night; the landlord, although he has room in his house, refuses to receive him. Is or is not the landlord warranted in so doing; and if not, has the traveller any and what remedy against the landlord for such refusal?

A.—An innkeeper is bound to receive a traveller into his house, and to find him with reasonable accommodation upon his tendering him a reasonable price for the same, unless the traveller be drunk or have a contagious disease; and if he fail therein the traveller or guest may have his remedy by an action on the case: (*Fell v. Knight*, 10 L. J. 227, Ex.) So the innkeeper is liable to be indicted at common law: (*Rex v. Ivens*, 7 C. & P. 219.)

Q.—What is a lien, and how does a general lien differ from a particular lien? Give instances of each.

A.—A lien is the right of retaining the possession of a chattel from the owner until a certain claim upon it is satisfied. A *general* lien is a right to detain a chattel until payment be made, not only for the particular articles, but for any balance that may be due on a general account in the same line of business; thus solicitors have a general lien on all papers in their hands belonging to their clients for their general costs. A *particular* lien is given to every person to whom a chattel has been delivered for the purpose of bestowing his labour upon it. Thus a tailor is not bound to deliver clothes which he has made until the price for making them be paid: (2 St. C. 81, 8th edit.) (a) A *particular* lien is favoured in law; but a *general* lien having a tendency to prefer one creditor above another is taken strictly: (Will. P. P. 31, 34, 10th edit.)

Q.—Is a workman who detains a chattel in exercise of his right of lien entitled to charge warehouse rent for keeping the chattel?

A.—No; not even if he had given notice of his intention to do so, and he is a wrong-doer from the time of making the demand: (*Somes v. British Empire Shipping Company*, 2 L. T. Rep. N. S. 547, H. of L.; Chit. Cont. 516, 11th edit.)

Q.—A. finds a pawn ticket, and, without any fraud, redeems the articles pledged. Some time after, and when the period of redemption has expired, B., the owner, appears and claims the goods. What are the respective rights of A. and B.?

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(a) The right of a lien is not incompatible with a right on the part of a person claiming it to sue for the same debt; but he may do so, retaining his lien as a collateral security: (*Hughes v. Lenny*, 5 M. & W. 183.)

A.—The pawnbroker is protected in such a transaction (sect. 25 of 35 & 36 Vict. c. 93); but B. is entitled to reclaim the goods from A., subject to his lien for what he has paid to redeem them and subsequent expenses: (see *Furber v. Sturmev*, 5 Jur. N. S. 45.)

Q.—Has the agister of cattle any right or lien in the cattle agisted? State the reason.

A.—He has not, unless by express agreement; for he is not bound to receive the cattle, nor does he work any improvement in them: (Chit. Cont. 515, n., 11th edit.; Sm. M. L. 559, 7th edit.)

Q.—If I keep my horse at a livery stable, has the keeper thereof any lien upon the horse for its keep? Give the reasons for your answer.

A.—A livery stable keeper has no lien for the keep of a horse delivered to him to be kept in the way of his trade. (Note (a) to Chitty on Contracts, p. 515, 11th edit. and cases there cited.) The reasons are, that he has no right to the exclusive possession of the animal and does not work any improvement on it.

Q.—Describe the nature of a *chose in action*.

A.—This phrase is sometimes used to signify a right of bringing an action, and at others the thing itself which forms the subject-matter of that right. But it more properly includes the idea, both of the thing itself, and of the right of action as annexed to it. Thus, money due on a bond is a *chose in action*; for there is no possession till recovered by course of law: (see 2 St. O. 11, 45, 122, 8th edit.)

Q.—Can the assignee of a *chose in action* maintain an action on it in his own name? State the exception to the rule.

A.—The assignee could not formerly, as shown *infra* by several examples, sue in his own name at law, although he might do so in equity, but used the name of the assignor, under a power of attorney for that purpose. The Sovereign was an exception to this rule; so were also bills of exchange, promissory notes, bills of lading, life and marine policies, and bail bonds. Now, any absolute assignment by writing under the hand of the assignor (not being by way of charge only), of which written notice has been given to the debtor, is sufficient at law (subject to any equities which would have been entitled to priority before this Act) to pass the legal right to such debt and to enable the assignee to give a good discharge for the same; but if the debtor has notice that the assignor disputes the assignment, or conflicting claims arise in respect thereof, he may either call upon the claimant to interplead or may pay the money into the High Court of Justice under the Trustees Relief Acts: (Judicature Act, 1873, s. 25, sub-sect. 6.)

Q.—If A. insures the life of B., need he have any and what interest in B.'s life, and need it continue till B. dies?

A.—By 14 Geo. 3, c. 48, the policy will be null and void if A. has no interest in B.'s life at the time of insuring it; but this interest need not continue till the death, the doctrine that a contract of life insurance is a contract for indemnity, only having been overruled by recent decisions: (*Law v. London Indisputable Life Policy Company*, 1 Kay & John. 223; see Will. P. P. 196, 10th edit.)

Q.—In what cases is it true that “a policy of insurance is a contract of indemnity?”

A.—Only in cases of fire and marine insurance: (see *Dalby v. The India and London Life Assurance Company*, Sm. L. C., 8th ed. 389.)

Q.—A. effects a policy of insurance on his own life, and then assigns it to trustees. After A.'s death, it being necessary to sue for the amount of the policy, in whose name must the action be brought? Will it make any difference if notice of the assignment be given to the assurance office?

A.—The action may now be brought in the names of the trustees if notice of the assignment be given to the company (30 & 31 Vict. c. 144); formerly it must have been brought in the names of the executors of A., for the policy and the right of action as annexed to it is a *chose in action*, which at law, with the exceptions stated, was not assignable. If notice be not given to the assurance office, the action must be brought (see 2 St. C. 11, 45, 122, 8th edit.) in the name of A.'s executors: (30 & 31 Vict. c. 144, s. 3.)

Q.—In the case of an assignment of a mortgage, could the assignee of the mortgagee, in his own name, sue the mortgagor at common law?

A.—The assignee could not recover such mortgage debt in his own name at law, for it was a *chose in action*. It should therefore have been sued for in the name of the mortgagee, under a power of attorney or agreement for that purpose: (2 St. C. *sup.*)

Q.—A. enters into a bond with B. in the penal sum of 1000*l.* conditioned for payment of 500*l.* and interest; B. assigns the bond to C.; A. does not pay his bond, and it becomes necessary to sue him. In whose name should the action against A. be brought? and state the reason for your answer.

A.—If absolutely assigned, and written notice be given to A., C. may sue him in his own name: (see *ante.*)

Q.—Give an instance of a *chose in action* being reduced into possession by the husband.

A.—If, for example, a bond debt is due to the wife *dum sola*, it does not become the husband's until he reduces it into possession, as by suing (jointly with his wife) and obtaining judgment on the bond: (see Chit. Cont. 156, 11th edit.)

Q.—In what respect is the law relating to *choses in action* altered by recent statutes?

A.—The 30 & 31 Vict. c. 144, enacted that the assignee of a policy of life assurance (and the 31 & 32 Vict. c. 86, of a policy of marine insurance), possessing at the time of action brought the right in equity to receive, and to give an effectual discharge to the insurance company liable under such policy for the money due thereon, might sue at law in his own name. He must, however, have given notice of the assignment to the insurance company. (As to 36 & 37 Vict. c. 66, s. 25, sub-sect. 6, see *ante*, p. 16.)

Q.—A gentleman is in the habit of sending his servant to a shop and receiving goods on credit; the servant misapplies some of the goods to his

own use. Has the seller a remedy for the value of the goods so misapplied against the master? The same servant also obtains goods on credit in his master's name of a tradesman who had never before had dealings with the master, and takes the goods to his own use. Can the tradesman recover the value against such master?

A.—In the first case put the master is liable, and the seller may have his remedy for the value of the goods against him; for he who accredits another by employing him must abide by the effects of that credit: since, where one of two innocent persons must suffer by the fraud of a third, he who enabled the third person to commit the fraud must be the sufferer. In the second case the master is not liable, he having given the servant no power to contract on credit, either express or implied: (see Sm. M. L. 125, 126, 7th edit.; 2 St. C. 235, 8th edit.)

Q.—Is a contract of hiring and service between master and servant dissolved by the death of the master?

A.—Yes; Unless there is a stipulation express or implied to the contrary: (Chit. Cont. 529, 11th edit.)

Q.—If a man is dissatisfied with his man-servant, and wishes to part with him, must he give him any, and what notice? And are there any circumstances which render a notice unnecessary?

A.—In the case of a domestic or menial servant, the master must, in general, give him a month's notice, or pay him a month's wages. In the case of a clerk a three month's notice is sometimes required, and sometimes a reasonable notice to expire at the end of the year. If the servant wilfully disobey any lawful orders, or unlawfully absent himself from work, or be guilty of moral misconduct, &c., he may be discharged without warning: (Chit. Con. 520, 11th edit.)

Q.—A servant's wages are payable quarterly, and have been paid to Lady-day, 1879. Between Lady-day and Midsummer, 1879, namely, on the 1st of May, the servant misconducts himself, and for such misconduct is turned away by his master without warning. Is the servant entitled *pro rata* to wages from Lady-day to May?

A.—Not if he is guilty of moral misconduct, as stated *supra*.

Q.—Must a contract to purchase a horse be in writing? How would it be if a warranty were given with the horse; must that be reduced to writing?

A.—If the price to be paid for the horse (or any goods, wares, or merchandise) is 10*l.* or upwards, the contract must be in writing, signed by the party to be charged, or his lawful agent, or the horse (or part of the goods, &c.) accepted and actually received, or something given to bind the bargain, or in part payment, otherwise the bargain is invalid: (29 Car. 2, c. 3, s. 17; 2 St. C. 69, 8th edit.)

It is not necessary that a warranty should be in writing unless the contract is in writing; but if so, then the warranty must be stated therein: (Chit. Cont. 423, 11th edit.)

Q.—A. buys a horse of B., and pays for it by a bill of exchange—the

horse proves unsound, and is resold at a less price by A. Is this any defence to an action on the bill of exchange brought by B. against A.?

A.—Formerly it was not; not even *pro tanto*. His remedy was by cross action (Chit. Cont. 428, 11th edit.); but now it could be set up by way of counter-claim: (36 & 37 Vict. c. 66, s. 24, sub-sect. 3.)

Q.—If I give a verbal order for goods to the amount of 100*l.* without receiving any part of them, or paying any part of the price, and afterwards refuse to receive them, do I incur any liability? Give the reason for your answer.

A.—No; being protected by the 17th section of the Statute of Frauds (29 Car. 2, c. 3).

Q.—What are the requisites of the Statute of Frauds (29 Car. 2, c. 3) as to the sale of goods of the value of 10*l.* and upwards, and how has this been affected by Lord Tenterden's Act (9 Geo. 4, c. 14), s. 7?

A.—The first part of this question we have answered (*vide sup.*). Formerly it was held that if the goods were not in existence or ready for delivery they were not affected by this statute. By the above Act, however, it is enacted that the 17th section of the Statute of Frauds shall extend to all contracts for the sale of goods to the value of 10*l.* and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not, at the time of the contract, be in existence or ready for delivery: (see Chit. Cont. 365, 11th edit.; 2 St. C. 69, 8th edit.)

Q.—When goods are sold on credit, and no time for their delivery is agreed upon, in whom is the right of property; and in whom is the right of possession immediately after the sale?

A.—If the sale is of specific goods, and *nothing remains to be done* by the seller, as between him and the buyer, before the goods purchased are to be delivered, the property in the goods immediately passes to the buyer, and that in the price to the seller. But if any act remains to be done by the seller, then the property does not pass until that act has been done. And the buyer is also immediately entitled to possession: (*Bloxham v. Saunders*, 4 B. & C. 948; *Tarling v. Baxter*, 6 B. & C. 360.)

Q.—If a man buys and pays for a parcel of cotton consisting of 100 bales, and another 100 bales unselected out of 1000 bales, all of which are consumed by fire before delivery, on whom does the loss fall? Give the reason.

A.—The loss of the first lot of 100 bales of cotton falls on the buyer; for, as the parcel was ascertained and distinguished at the time of the contract, the property in the cotton passed to the buyer. But as to the 100 bales unselected and unascertained, the loss will fall on the vendor, for no property therein passed to the buyer by the contract: (see *Bloxham v. Saunders*, 4 B. & C. 948; *Tarling v. Baxter*, 6 B. & C. 360.)

Q.—Define a warranty and give an instance.

A.—A warranty is an undertaking express or implied, arising or given on the sale of goods and chattels. Warranties on the sale of lands have long been obsolete. On the sale of goods and chattels every affirmation



made by the vendor at the time of sale in relation to the articles sold amounts to a warranty if it appears to have been so intended. So a warranty is in certain cases implied: (see Chit. Cont. 414, *et seq.* 11th edit.; *Chandelor v. Lopus*, Sm. L. O. vol. i.)

**Q.**—In an action on the warranty of a horse, would an implied warranty be sufficient upon which to maintain an action? Does a sound price amount to a warranty?

**A.**—Where the vendor has bound himself by a warranty, either express or implied, the vendee may bring an action thereon against him: (Sm. M. L. 515, 7th edit.) A sound price does not amount to a warranty: (see Chit. Cont. 416, 11th edit.)

**Q.**—In the absence of any express warranty, what is the rule of law with reference to warranties as to quality upon sale of goods? What is the maxim affecting such sales?

**A.**—In the absence of any express warranty upon a sale of goods, the general rule is, that there is no implied warranty as to their quality or goodness, but where the purchaser relies upon the vendor's judgment there is an implied warranty. The maxim is *caveat emptor*: (Chit. Cont. 416, 11th edit.)

**Q.**—Is a warranty made subsequent to a sale valid or not? Give the reasons for your opinion.

**A.**—No; a warranty made *after* a sale is void for want of consideration: (Chit. Cont. 51, 424, 11th edit.; *Roscorla v. Thomas*, 3 Q. B. 234.)

**Q.**—What remedies has the vendee of a warranted chattel on breach of warranty?

**A.**—He may either use such breach in reduction of the vendor's claim for compensation, or may bring an action thereon against him. But he cannot, if he has received a specific article, return it and recover the price as money paid on a consideration which has failed. This latter principle, however, does not apply to manufactured goods which have never been completely accepted; for if the vendee has done nothing more than give the article a fair trial, he may, on discovering the defect, return it: (Chit. Cont. 427, 11th edit.; *Street v. Blay*, 2 B. & Ad. 156.)

**Q.**—State the difference between the sale and delivery of specific goods on condition and with a warranty.

**A.**—The non-performance of a condition precedent before any default by the defendant entitles the latter to consider himself freed from his liability to do the act which he agreed to perform after such condition precedent should have been executed: (Chit. Cont. 676, 11th edit.)

But where the contract of sale and warranty have reference to a specific article, which was *in esse* at the time of sale, then, unless there be a condition in the contract to that effect, the purchaser is not entitled to reject the article when delivered on the ground of an alleged breach of warranty, and the fact of his tendering or returning such article to the vendor was formerly no defence to an action for the price: (Chit. Cont. 11th edit., p. 427.) Under the New Procedure it can, however, be set up by way of counter-claim: (see 36 & 37 Vict. c. 66, s. 24, sub-sect. 3.)

**Q.**—In an action for a breach of warranty what is the measure of damages ?

**A.**—The difference between the contract price of the article supplied and the sum proved to be its true market value : (Chit. Cont. 430, 11th edit.)

**Q.**—What is the meaning of a *del credere* commission, and what liability does a factor incur by the receipt of a *del credere* commission ?

**A.**—The name *del credere* commission has been taken from an Italian mercantile phrase signifying *guarantee*. Such an agent or factor, for a higher commission than is usual, guarantees (as a surety) the due payment to his employer of the price of the goods sold : (Sm. M. L. 119, 7th edit. ; Chit. Cont. 194, 11th edit.)

**Q.**—What authority does an agent require to execute a deed for his principal, so as to bind his principal ?

**A.**—It is a general rule that an agent who is to execute a deed must be appointed by deed for that purpose (*a*) : (2 St. C. 64, 8th edit. ; Sm. M. L. 111, 7th edit. ; Chit. Cont. 194, 11th edit.)

**Q.**—How may an agent be empowered to sign, on behalf of his principal, a contract which, by the Statute of Frauds, is required to be in writing ? and does he need a written authority ?

**A.**—The first and third sections of the Statute of Frauds require that an agent who signs an agreement of the nature therein mentioned shall be authorised by writing to do so ; but under the fourth and seventeenth sections this is not necessary, and accordingly under those sections a verbal authority to the agent is sufficient : (Chit. Cont. 69, 11th edit.)

**Q.**—Is an agent's authority revocable after a part execution thereof by the agent.

**A.**—No ; except on payment by the principal of a compensation for the labour and expense which may have been incurred by the agent in the course of the employment : (Chit. Cont. 197, 11th edit.)

**Q.**—If an agent who has been entrusted with the sale of goods sells them after his agency has been revoked, can the principal, in any and what case, maintain an action for their recovery against the purchaser ?

**A.**—The principal can only do so where the purchaser has had notice of the revocation of the agency, as by the Factors Acts the agent having possession of the goods has power to dispose of them : (see Factors Acts, 4 Geo. 4, c. 83 ; 6 Geo. 4, c. 94 ; 5 & 6 Vict. c. 39, and 40 & 41 Vict. c. 39.)

**Q.**—What is the extent of the authority which the master of a ship has to bind his owners by contracts made by him during the voyage ?

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(*a*) To this rule there is an exception in the case of two joint contractors, one of whom it has been held may execute a deed for himself and the other, without an authority under seal, provided he execute "for himself and the other in the presence of that other : " (Add. Cont. 606, 5th edit., citing *Ball v. Dunsterville*, 4 T. R. 313.) And although the agent of a corporation aggregate must be appointed by deed, yet certain agencies even for corporations may be done without an authority by deed : (see Sm. M. L. 106, 7th edit.)



**A.**—The master of a ship is appointed for the purpose of conducting the navigation of the ship to a favourable termination; and accordingly, when payments must be made in the course of the voyage, for which ready money is required, and the ship is in a foreign port, where the owner has no agent; or in an English port, but at a distance from the owner's residence; the master has power, as incidental to his appointment, to borrow money on the owner's credit and on security of the ship, in order to make such payment: (Chit. Cont. 201, 11th edit.)

**Q.**—To what extent has the captain of a vessel power to sell the cargo?

**A.**—In cases of urgent necessity, as where the goods are perishable, and there is no alternative but total loss, or where money is needed for the purposes of the voyage, and cannot be obtained by hypothecation of the vessel or partial sale of the cargo: (Abbott, 12th edit. 310.)

**Q.**—Is the master of a general ship liable to the owners of goods for damage done to them by the careless stowage of the stevedore appointed by the charterer, but to be paid by and act under the captain's order? Give the reason for your answer.

**A.**—He is not liable. Where a charter-party contains a stipulation that the stevedore shall be appointed by the charterer, the master is not liable for injury done to goods by the negligence of the stevedore, in the absence of any contract with the owner of the goods, or interference by the master. The stevedore is not appointed by the master and is not his agent: (*Blaikie v. Stembridge*, 28 L. J. 329, C. P.)

**Q.**—Where an authority is given to three persons, if one exercised the authority would the principal be bound?

**A.**—It appears not: (*Brown v. Andrew*, 18 L. J. 153, Q. B.; Chit. Cont. 202, 11th edit.) But this rule would seem not to be strictly followed in cases of mercantile agency: (see *Godfrey v. Saunders*, 3 Wils. 78; *Dickson v. Lodge*, 1 Starkie, 226.)

**Q.**—Under what circumstances is a principal bound by the acts of his sub-agent?

**A.**—As a general rule, the principal is not liable for the acts of a sub-agent, the agent having no right to delegate his authority. But if the principal ratify the acts of his sub-agent he is liable. And in some cases of tort the principal is liable; especially if it can be shown that the sub-agent stood in the relation of servant to the principal: (Chit. Cont. 202, 370, 11th edit.; Sm. M. L. 109, 149, and note *f*, 7th edit.)

**Q.**—If A. be authorised to make a valuation of goods, is such valuation valid if made by A.'s clerk?

**A.**—As an agent cannot delegate his authority, the valuation will not be good if made by A.'s clerk; unless, indeed, it be done with the sanction of the principal, or in accordance with the usage of the trade: (see Chit. Cont. 202, 370, 11th edit.; Sm. M. L. 109, 149, and note, 7th edit.)

**Q.**—State the several means by which an agent's authority can be determined.

A.—1. By the express revocation thereof by the principal or by his own renunciation.

2. By the death or bankruptcy of himself or principal.

3. By efflux of time where a specific period is fixed, either by express agreement or by the usage of trade, for the execution of the act to be done by him.

4. By the execution of his commission, whereby the agent becomes *functus officio*: (Chit. Cont. 196, 11th edit.)

Q.—If an agent agrees to act for a firm in partnership for a term of years, is the contract dissolved by the death of one of the partners during the term?

A.—Yes; and the agent cannot sue the remaining partner for not continuing him during the remainder of the term, for the contract has reference only to the existing partnership: (*Tasker v. Shepherd*, 6 H. & N. 575; s. c. 4 L. T. Rep. N. S. 19; Chit. Cont. 245, 11th edit.)

Q.—Who is the proper party to sue on a contract; the party with whom it is made or the party from whom the consideration moves? For instance, if a contract be made between agents for their respective principals, who can sue and be sued?

A.—The proper party to sue on a simple contract is, as a general rule, he from whom the consideration moves; and a contract duly made by an agent is the contract of the principal, from which it follows that the latter is entitled to enforce it by action in his own name. If the principal is disclosed, then he must, as a rule, sue upon it (a); but if not disclosed, either he or his agent may sue. On the other hand, as the principal can sue, he may, when discovered, be sued, although the agent contracted as the principal: (*Addison v. Gandasequi*, 2 Sm. L. C.; *Thompson v. Davenport*, *ib.*)

As to when the agent is liable, see *infra*.

Q.—In what cases is an agent liable on contracts entered into for a principal?

A.—The agent is personally liable: (1) where he pledges his own personal credit; or (2) conceals his principal; or (3) where he contracts as agent, yet in such terms as to bind himself, as where he covenanted "for himself, his heirs," &c.; or (4) where he exceeds his authority; or (5) fraudulently misrepresents the extent of his authority: (Chit. Cont. 210, 11th edit.; *Paterson v. Gandasequi*, 2 Sm. L. C. 360.)

Q.—If a factor or agent sells goods for an undisclosed principal, in whose name may an action be brought for the goods? And what is the rule of set-off applicable in these cases?

A.—As above stated in such a case, either the undisclosed principal or the factor or agent may sue. But the right of the principal to sue would be subject to any set-off the debtor might have against the factor or agent

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(a) If the agent has a special *property* or *interest* in the subject-matter of the contract, as in the case of a factor, a carrier, warehouseman, and an auctioneer, he may sue unless the principal elect to try the action in his own name: (Chit. Cont. 215, 11th edit.)

(but not broker). And, generally speaking, in actions by an agent against a debtor, whatever would be a defence against the principal would be so against him : (*George v. Claggett*, 2 Sm. L. O. 118 ; Sm. M. L. 157, 7th edit.)

Q.—Would it make a difference as to the party to sue if the contract were under seal ?

A.—Yes ; then the rule is that only those who are parties or privy to a deed (*inter partes* relating to goods and chattels) can sue upon it : (Sm. M. L. 162, 7th edit.) By the 8 & 9 Vict. c. 106, however, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture : (sect. 5.)

Q.—What is the main essential to the validity of a deed ? In case of a deed made between A. and C., containing a covenant by C. to pay to A. moneys for the use of B., which of the two, A. or B., is the proper person to sue C. for the breach of covenant ?

A.—The main essentials are sealing and delivery. In the case put A. is the party to sue C., for the reason before stated.

Q.—Is it necessary that a condition to be operative in a deed should be in the deed itself ?

A.—A condition may be in the same deed or indorsed thereon, or contained in another deed. But if by a separate instrument, and it operates to defeat an estate, it is properly a defeasance and not a condition. A condition to defeat a *freehold* estate must, however, either be in the same deed or in one executed contemporaneously with the principal deed : (Pet. Abr. 167, 2nd edit. ; 1 Sm. Comp. 738, 4th edit.)

Q.—A factor in this country buys for a merchant abroad. Can the factor be sued in this country ? On what principle do the courts proceed ?

A.—Formerly it was a rule that where a British agent contracted for a foreign principal, the British agent might be sued, for it was said there was no responsible employer : (see Sm. M. L. 170, 7th edit.) But now the rule is that in all cases of this kind it is a question of intention ; if it is clear on the face of the contract that the agent contracted as agent merely, he is not liable and cannot be sued : (*Green v. Kopke*, 25 L. J., N. S. 297 ; and see *Ohit. Cont.* 214, 11th edit.)

Q.—Who are the parties to sue and be sued on a bill of lading ?

A.—Either the consignee of the goods or the indorsee of the bill may now sue upon it (18 & 19 Vict. c. 111, s. 1) ; formerly the indorsee could not sue in his own name on the instrument, but he might have sued in trover for the goods. But should the bill direct the delivery to be made "to A. for the use of B.," B. would be the plaintiff. The carrier is made defendant : (*Ohit. Cont.* 468, 11th edit.)

Q.—Goods are shipped for London consigned to A. The captain signs two bills of lading, marked first and second. A. indorses the first to B.

and the second to C. The goods are warehoused. On production of the second bill of lading by C. the goods are delivered to him. What remedy has B.? If a thief had stolen the second bill of lading from C. and got delivery, would B. and C. respectively have any remedy, and against whom?

A.—The right to the goods is in the first indorsee. B. would, therefore, have a remedy against C. for the conversion, and also against A., but not against the warehousemen: (see *Gurney v. Behrend*, 3 E. & B. 622; and *Glyn Mills and Co. v. The East and West India Docks Company*, 50 L. J. 62, Q. B.) In the second case, B. could both prosecute the thief for felony and sue him for the goods, and he would also have an action for damages against A. C. would also have a remedy against A. for damages.

Q.—What will constitute a partnership with regard to third parties?

A.—Traders become partners between themselves by a mutual participation of profit and loss; but as to third parties they are partners if they share the *profits* of the concern, except as stated *post*. And further, if anyone lends his name and credit to a firm, and, as the phrase is, holds himself out to the world as a partner therein, he is liable for its engagements, and that whether he has any real interest in the firm or not: (see *Waugh v. Carver*, 1 Sm. L. C. and notes; also the interesting judgment of Jessel, M.R. in *Pooley v. Driver*, 46 L. J. Ch.)

Q.—A. sells his business to B., giving B. the right to use his name. B., using A.'s name, continues to deal with C., as A. had previously done. C. had no notice of the transfer of the business. B. fails, owing C. money. Can C. recover against A.? Would it make any difference if A., while in business, had never traded with C., but was known to C. as a substantial man? Give reasons.

A.—In this case A. would be liable; for the fact of his name being held out was an inducement for persons to contract. There would be no difference if A. had never traded with C.: (*Waugh v. Carver*, 1 Sm. L. C.; and see Lindley on Partnership, vol. 1, p. 47.)

Q.—If A. lend to B. and Co. a sum of money upon a contract in writing that A. shall receive a rate of interest varying with the profits of the trade carried on by B. and Co., or a stated share in such profits, will such loan constitute A. a partner with B. and Co.?

A.—No; the 28 & 29 Vict. c. 86, expressly enacts that this shall not of itself constitute the lender a partner with the persons carrying on the trade, &c., or render him responsible as such: (sect. 1.) But in case the firm becomes bankrupt, &c., the lender cannot recover any part of his principal, profits, or interest until the other creditors of the firm for value have been satisfied: (sect. 5.) (a)

Q.—Could partners sue each other at law, and for what claims?

A.—Where an account had been taken and a *final* balance struck, a partner might sue at law for what appeared to be due to him on such

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(a) This question was asked by the Examiners in the Conveyancing Division, but we have thought it would be more appropriately placed here.

balance from his copartner. So one partner might sue another for money received to the separate use of the former and wrongfully carried to the partnership account; also for debts due before the partnership. Subject to these and a few other exceptions, the general rule of law was, that between partners no action (*a*) could be maintained for work and labour or money expended on account of the partnership: (see Chit. Cont. 230, 11th edit.) Under the new law one partner can sue another in the Common Law Division in the above cases, but the Equity Division retains its exclusive jurisdiction in dissolving partnership and taking the accounts: (36 & 37 Vict. c. 66, s. 35.)

**Q.**—A. and B. are partners in trade; A. improperly uses the partnership name by making a promissory note in the name of the firm; B. is compelled to pay the note. Has B. any and what remedy against A.?

**A.**—Yes; B. may by action recover the money so paid from A., as money paid to his use; this was another exception to the above rule: (Chit. Cont. 234, 11th edit.)

**Q.**—State the general rules regulating the liability of partners for the acts of each other.

**A.**—It is a general rule that each partner is the accredited agent of the rest, and may bind the firm by *simple contracts* in all matters incident to the business of the firm; as by bill, note, (*b*) or receipt; and may even give a valid *release* by *deed*, but he cannot in other cases bind the firm by *deed* unless he have express authority by deed for that purpose, nor by submission to arbitration. So, in some cases of tort by one partner, the others would be liable, as, damage done by running down a ship. But in no cases of fraud will the acts of one partner bind the others where there is collusion between him and the party with whom he deals: (see Sm. M. L. tit. "Partners.")

**Q.**—What is meant by "*stoppage in transitu*," and how is the right lost?

**A.**—*Stoppage in transitu* is that right which a vendor of goods sold on credit has to stop them while on their way to the vendee, when he becomes bankrupt. The assignment by the vendee of the bill of lading to a third person for value without notice of the bankruptcy will defeat the vendor's right to stop *in transitu* (*Lickbarrow v. Mason*, 1 Sm. L. C. 388), or the transfer of the document of title to the goods (40 & 41 Vict. c. 39, s. 5), or if a new *transitus* is given to the goods. So if the goods were put on board the consignee's own ship to be carried for and at the risk of the consignee; or if, while in the vendor's warehouse, he receives rent for them from a purchaser of the vendee: (Chit. Cont. 400, 11th edit.)

(*a*) As to the action of account in such cases, see Sm. M. L. *sup.*; *Berr v. Berr*, 12 C. B. 2.

(*b*) But partners in legal, medical, mining, and farming partnerships cannot bind the firm by bill or note: (see Sm. M. L. 44, 7th edit.) Nor can railway companies do so: (*Bateman v. The Mid-Wales Railway Company*, L. Rep 1 C. P. 499.) Nor companies registered under the Companies Act, 1862, unless such a power can be gathered from a fair construction of the articles of association: (*Peruvian Railway Company v. Thames, &c., Insurance Company*, L. Rep. 2 Ch. App. 617.)

**Q.**—Give an instance of stoppage *in transitu*.

**A.**—If a factor abroad were to consign goods, *ex. gr.* corn, to a merchant here, and before the goods have reached the merchant he becomes bankrupt, the factor abroad would have a right (if the right be not lost) to prevent the corn being delivered to the bankrupt merchant or his trustee. Mere notice to the holder of the goods is sufficient: (*Lickbarrow v. Mason*, 1 Sm. L. O.)

**Q.**—What is a bottomry bond? Define it.

**A.**—A bottomry bond is a form of instrument used for the purpose of hypothecating a vessel, by the master when in foreign parts, for the purpose of raising money for necessary repairs of the ship. The “bottom” or keel of the ship (which implies the whole vessel) becomes pledged for the repayment of the money; it is not payable unless the ship arrives home, and where there are several the last has priority.

**Q.**—What is a charter-party, and what a bill of lading?

**A.**—A charter-party is an agreement for the hire of a vessel, made between either the owner or master of the ship on the one part, and the owner of goods on the other, for the conveyance of the goods for a certain voyage (or time) at a fixed amount of freight: (2 St. C. 139, 8th edit.)

A bill of lading is an instrument used for authenticating the transfer or assignment of goods sent from beyond seas to a party resident here. In form it is a receipt from the captain of a vessel to the shipper of goods, undertaking to deliver them (on payment of the freight) to the person whose name is mentioned in the bill, or indorsed thereon by the shipper. The delivery of this instrument passes the property in the goods to the holder or indorsee: (2 St. C. 48, 8th edit.)

**Q.**—What is meant by the term *demurrage*? and give an instance where a shipowner may recover in respect thereof against his charterer.

**A.**—The merchant usually covenants to load and unload within a specified time, or, if he detain the ship for a longer time, which he sometimes receives liberty to do, to pay a daily sum which, as well as the delay itself, is called *demurrage*. With respect to the time allowed for loading and unloading, it is held, that the merchant must pay demurrage for any delay beyond the arranged period, even though not attributable to his fault, but to some unforeseen impediment to her loading or unloading, such as the crowded state of the docks; for he has expressly engaged and is bound by the terms of his own positive contract: (Smith’s Mercantile Law, 298, 7th edit.)

**Q.**—Define general average and particular average.

**A.**—General average is a term used in maritime commerce to express the contribution which the owners of the ship, freight, and cargo contribute for the relief of those persons who, for the preservation of the ship and the goods and lives on board, have sacrificed their own property by casting it into the sea: (see Sm. M. L. 328-330, 7th edit.)

Particular average signifies a partial loss sustained by the assured of a ship or cargo not connected with the loss of any other property, and not



occasioned by a general average contribution: (a) (see Add. Cont. 650, 3rd edit.; Sm. M. L. 364, &c., 7th edit.)

**Q.**—A ship having been wrecked, how must the shipowner proceed in order to insure the loss being treated as total?

**A.**—He must within a reasonable time give notice of the abandonment of the ship, so as to give the underwriters a chance to recover her, or what remains of her: (see Sm. M. of C. L. tit. "Insurers and Insured.")

**Q.**—Explain the meaning of the expression "jettison."

**A.**—"Jettison" is the voluntary throwing overboard of goods or merchandise in time of distress: (2 St. C. 130, 8th edit.)

**Q.**—How are British ships held and transferred?

**A.**—They are held in shares, of which there are sixty-four, and sixty-four individuals may now be registered as owners: (43 & 44 Vict. c. 18.)

A registered ship, or any share therein, is transferred by bill of sale containing a description of the ship, according to the form in the Merchant Shipping Act, 1854, executed in the presence of, and attested by one witness at least, and registered at the port at which the ship is registered. The transferee must make the necessary declaration, which is registered in like manner: (see Will. P. P. 65, 10th edit.)

**Q.**—A. and B., partners, bring an action for a client C.; when the cause is at issue A. dies; B. continues the action and fails; C. afterwards refuses to pay the costs incurred. Who should sue C. for the costs?

**A.**—Formerly B. the surviving partner, must have sued C. for the costs (Arch. New Pract. 27, 2nd edit.); but A.'s representative may now be joined with him: (Ord. XVI., r. 1.)

**Q.**—If there be two joint obligors in a bond, and one dies, against whom should the action be brought?

**A.**—The action was formerly brought against the surviving obligor; for it was a rule, that in case of a joint contract respecting personalty, if one of the parties died, his executor or administrator was, at *law*, discharged from liability (see references *infra*); but now the representative of the deceased may be joined: (Ord. XVI., r. 4.)

**Q.**—If a joint promise is made by A. and B. to C., who are all dead, leaving executors, who are the parties to sue and be sued?

**A.**—The executors of C. should sue the executors of A. and B.: (see *supra*.)

**Q.**—Will a covenant not to sue given by one of two joint creditors operate as a release?

**A.**—No; the covenant so entered into by one cannot be pleaded in bar as a release of the joint action by both: (Add. Cont. 921, 5th edit.; *Walmsley v. Cooper*, 11 Ad. & E. 221.)

**Q.**—A testator dies leaving a right of action for money due to him

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(a) Mr. Phillips defines particular average to be "a loss borne wholly by the party on whose property it takes place:" (sect. 1422.)

upon bond, and also a right of action for libel or slander. Can his executors maintain an action in respect of both or either and which of the above rights of action of their testator?

A.—The executors may sue on the bond, but they cannot sue for the libel or slander; the maxim *Actio personalis moritur cum persona* applying in the last case: (see Broo. Max. 703-708, 2nd edit.)

Q.—As a general rule, should an action against a carrier for the loss of goods be brought by the consignor or consignee? And give instances of exceptions to the rule.

A.—Generally speaking the consignee is the proper plaintiff if the goods be lost; for the law presumes the contract for the carriage is between him and the carrier. But if the carrier is employed by the consignor, and the goods are at his risk; or if they are merely sent for approval, or the property therein has not passed to the consignee, or the consignor retains a special property therein, then the consignor should sue: (Chit. Cont. 467, 11th edit.)

Q.—A. orders goods of B. to be sent by carrier, C., who receives but loses the goods; A. refuses to pay for them. What remedy have the parties, and against whom?

A.—In the case given, B. can compel A. to pay for the goods by action for goods sold and delivered, for after the delivery to the carrier the property in the goods passed to A., and the goods were at his risk. And as a natural consequence A. can sue the carrier for the loss: (Chit. *sup.*)

Q.—If I insure the goods of another person for my own benefit against loss by fire or perils by the sea, have I any remedy against the insurance office or underwriters in the event of a loss? Give a reason for your answer.

A.—No; because an insurance is a contract for indemnity: (*Godsall v. Boldero*, 2 Sm. L. O., and the notes there.)

Q.—Can a person lawfully receive more than 5 per cent. interest, and, if so, on what security?

A.—A person may now receive more than 5 per cent. interest on any security, as the laws against usury are repealed by the 17 & 18 Vict. c. 90: (2 St. C. 95, 8th edit.)

Q.—Mention some of the alterations in the law made by the Mercantile Law Amendment Act, 1856.

A.—They are the following:—That a surety paying a debt is entitled to all securities held by the creditor: (sect. 1.) On the breach of a contract to deliver specific goods for a price in money, the jury, by leave of the presiding judge, may find what the goods are, and, by leave of the court or a judge, execution may issue for the goods on payment of the sum found to be due for the same: (sect. 2.)

It is no longer necessary that a consideration for a guarantee should appear in the writing evidencing the guarantee, as was formerly necessary: (sect. 3.)

Merchants' accounts are now placed on the same footing with respect to



the time for bringing an action thereon as other simple contract debts : (sect. 8.)

Absence beyond seas, or imprisonment of a creditor, is no longer a disability : (sect. 10.)

And if one of several contractors is abroad, the statute now runs against those residing here ; but a judgment obtained against those here cannot be pleaded in bar to proceedings against those abroad when they return : (sect. 11.)

The provisions of the 9 Geo. 4, c. 14, ss. 1, 8, extended to acknowledgments by duly authorised agents : (sect. 13.)

Part payment by one contractor, &c., is not to take a debt out of the statute against another co-contractor, &c. : (sect. 14 of 19 & 20 Vict. c. 97.)

**Q.**—In what order, must, in strictness, an executor pay—specialty debts—simple contract debts—funeral expenses—testamentary expenses—rent—specific legacies ; and general legacies ?

**A.**—(1) Reasonable funeral and testamentary expenses ; (2) if testator died after 1869, specialty debts, arrears of rent, and simple contract debts ; (3) specific legacies ; (4) general legacies.

**Q.**—What is the law as to the payment of the debts of relations and third parties ?

**A.**—The law is the same ; this fact neither gives a preference nor operates as a prejudice.

**Q.**—What is the general common law rule as to interest on a debt in the absence of any express stipulation to pay it, and how may a creditor make his debt carry interest ? How does the stat. 3 & 4 Will. 4, c. 42, affect this ?

**A.**—The rule is, that the law does not *imply* a contract by the debtor to pay interest unless such be the usage of trade. To this rule, however, bills of exchange, promissory notes, and over-due money bonds form an exception. And now, by the 3 & 4 Will. 4, c. 42, s. 28, a current rate of interest upon all debts or sums certain *may* be allowed by a jury to a creditor, from the time such debts or sums were to be paid, if payable by a written instrument at a certain and specified time ; but if not so payable, then from the time a written demand for payment is made and notice given that interest will be claimed from then until payment : (see Chit. Cont. 600, 11th edit.)

**Q.**—When can the vendor of goods recover from the vendee interest on the price of the goods sold ?

**A.**—Where there is an express contract to pay interest ; or a notice given under 3 & 4 Will. 4, c. 42, s. 28, claiming interest ; or if the goods are to be paid for by a bill, at a certain date, and the bill is *not* given, interest on the price, from the time the bill would have become due, is recoverable under the clause for goods sold and delivered, without such notice : (Chit. Cont. 600, 11th edit.)

**Q.**—What is the law as to appropriation of payments—thus, where a debtor pays money to his creditor, who has two distinct debts due to him,

which of the two has the right to direct to which debt the payment shall be applied? In the absence of any express appropriation, how will it be applied?

A.—The debtor has the first right of appropriating the payment; but if he neglects to do so the creditor may appropriate it to which debt he pleases. It is not, however, essential that the debtor should make an *express* appropriation at the time of payment; if circumstances show an intention to appropriate to a particular debt, the creditor is bound thereby. If neither party appropriates, the law will do so to the earlier items of account: (see Chit. Cont. 689-694, 11th edit.)

Q.—How far are contracts and the remedies thereon affected by statute? State what you know on the subject.

A.—As before fully shown, certain contracts are by the Statute of Frauds, by the 9 Geo. 4, c. 14, and other Acts, required to be in writing, and some are, by the 8 & 9 Vict. c. 106, required to be by deed. If not in writing, in some cases the particular statute says that no action shall be brought, in others that the contract is invalid. The remedies given by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), were specific performance in certain cases, and by 21 & 22 Vict. c. 27, courts of equity might award damages in addition to specific performance. The Equity Division retains its exclusive jurisdiction as to the specific performance of contracts relating to real estates: (36 & 37 Vict. c. 66, s. 34, sub-sect. 3.)

## 2. Guarantees.

Q.—What is the nature of a guarantee?

A.—It is a *collateral* promise, in writing, to answer for the debt, default, or miscarriage of *another*, who remains *primarily* liable for such debt, &c.: (Chit. Cont. 475, 11th edit.; *Birkmyr v. Darnell*, 1 Sm. L. O. 326.)

Q.—Describe the legal incidents of a guarantee. (a)

A.—It must be *in writing*, signed by the party to be charged or his lawful agent, otherwise it cannot be sued upon: (29 Car. 2, c. 3, s. 4; *Birkmyr v. Darnell*, *sup.*) It must contain a *promise* to pay and the name of the person to whom the promise is made. It requires a *consideration*: but that need not now appear in the instrument (19 & 20 Vict. c. 97, s. 3), as was formerly necessary: (*Wain v. Warlters*, 2 Sm. L. O. 251.) So a guarantee must be stamped before it can be given in evidence, if the principal contract would require a stamp: (Sm. M. L. 470, 7th edit.)

Q.—Must a guarantee for a third party be in writing, or will a verbal promise be sufficient?

A.—As above stated, the Statute of Frauds prevents a verbal guarantee from being sued upon: (29 Car. 2, c. 3, s. 4.) Formerly, if a party admitted that he had made a binding guarantee by paying money into court on a count charging him with it, that rendered proof of a written instrument unnecessary: (Sm. M. L. 461, 7th edit.) Again, it must be

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(a) Also asked thus: What are the requisites of an undertaking to pay the debt of another?

borne in mind that the statute only applies where the person whose debt, &c., is guaranteed is still to continue liable : (*Birkmyr v. Darnell, sup.*)

**Q.**—In what way, other than by a memorandum in writing, can a person render himself liable for the debts of another ?

**A.**—Where a third person accompanies another who orders goods for which the seller refuses to give the latter credit, and the third party promises to pay for them, his *verbal* promise is sufficient to render him liable ; the goods being in fact *sold* to the third party, though delivered to the other. But if a party who orders the goods be treated by the seller as the debtor, a verbal promise by a third party will not render him liable. The question is *to whom was credit given?* and this must in general be decided by a jury : (see Sm. M. L. 465, 7th edit.)

**Q.**—In a guarantee on behalf of a third person must any consideration be stated, and how, and of what kind should it be ?

**A.**—Formerly a consideration must have appeared in the writing (*Wain v. Warlters, sup.*) ; but by the 19 & 20 Vict. c. 97, it is not now necessary that the consideration should appear in the writing or by necessary implication from a written document : (see sect. 3 ; 2 St. C. 104, 8th edit.)

As to the kind of consideration, in general any act in the nature of a benefit to the person promising, or any act which is a detriment to him to whom the promise is made, is sufficient : (see Sm. M. L. 467, 468, 7th edit.)

**Q.**—What is a continuing guarantee ? A. and B. jointly guarantee payment of a debt due from C. Under what circumstances might A. and B., or either of them, be released without any action of their own ?

**A.**—A continuing guarantee is one which is not confined to any one transaction, but which exists until the credit be recalled by notice : (Chit. Cont., 9th edit., 495.) A. and B. would be released by the creditor's releasing the principal debtor, or agreeing to release, or by agreeing for valuable consideration to give him time, without reservation of rights, against the sureties, and in many other cases : (see Chit. Cont., 9th edit., 497.)

**Q.**—Give an instance of how a surety for the payment of a debt due from a third party can be discharged from his liability by the conduct of the creditor.

**A.**—Any enlargement of the time of payment by a binding contract which ties up the hands of the creditor, and prevents him from suing the principal debtor upon the original obligation, discharges the surety, inasmuch as the situation of the surety is varied and his liability prolonged beyond what was originally contemplated (*Coomb v. Woolf*, 3 Bing. 163 ; 2 St. C. 104, 8th edit.) ; or by B., the creditor, accepting payment otherwise than in money—*e.g.* in country bank notes, the surety is not liable if the notes are not paid : (Chit. Cont., p. 504, 11th edit.)

**Q.**—If one of several sureties is called on to pay the whole of a guaranteed debt, has he any, and if any what, remedy against the principal debtor and co-sureties respectively ?

**A.**—He may recover against the principal all moneys which he has paid

upon, or any damages which he has incurred under his guarantee, and as against his co-sureties he is entitled to contribution for the sum he has paid in excess of his proportion of the demand; and by 19 & 20 Vict. c. 97, s. 5, he is entitled to have the benefit of all securities held by a creditor, and to use his name, if necessary, to recover upon them, and payment by him cannot be pleaded as a satisfaction of the debt, but as against co-sureties he can only recover the fair proportion: (Chit. Cont. 505, 11th edit.)

**Q.**—When does the right of the surety in a guaranty to compel the principal to indemnify him arise? and how may he then be able to improve his position with regard to that principal?

**A.**—On paying the debt he may proceed as above stated.

**Q.**—A. B., in the presence of a witness, makes a representation concerning the character of a third party, upon which credit is given to the latter; such representation proving false, can an action be successfully maintained against A. B.?

**A.**—No; for by 9 Geo. 4, c. 14, it is enacted that no action shall be brought to charge any person, by reason of any representation or assurance made or given concerning or relating to the conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon (a) unless such representation or assurance be made in writing, signed by the party to be charged therewith:” (see 2 St. C. 103, 8th edit.)

**Q.**—Should you advise that an action would lie upon the following guarantee:—To A. B. I agree to pay for whatever goods you should sell to C. D., in case of his making default in the payment thereof. E. F.?

**A.**—There being a consideration and a promise I should advise an action to be brought: (see Sm. M. L. *sup.*)

**Q.**—If a guarantee is given to several persons who are not themselves interested in the subject-matter of the guarantee, who must be the parties to sue on the guarantee?

**A.**—If the persons to whom the guarantee is given are entire strangers to the consideration, they cannot sue in their own names; therefore, the person from whom the consideration moves must be the plaintiff: (see Chit. Cont. 53, 11th edit., and the cases there considered.)

### *Bills of Exchange, Promissory Notes, and Cheques.*

**Q.**—Define a bill of exchange.

**A.**—It is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requesting the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer: (45 & 46 Vict. c. 61, s. 3 (1). (b))

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(a) So in the Act.

(b) An instrument bad as a bill of exchange may be good as a promissory note: (*Fielder v. Marshall*, 3 L. T. Rep. N. S. 858.)

**Q.**—Define a promissory note.

**A.**—It is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable time a sum certain in money to, or to the order of, a specified person, or to bearer: (45 & 46 Vict. c. 61, s. 83 (1).)

**Q.**—Define a cheque.

**A.**—A bill of exchange drawn on a banker, payable on demand: (45 & 46 Vict. c. 61, s. 73.) (a)

**Q.**—What is the effect of crossing a cheque, and what is the effect of crossing it with the name of a banking firm?

**A.**—The effect of simply crossing a cheque is to make it payable only to or through some banker. If crossed with the name of a banking firm it can only be paid to or through that firm: (*Ib.*, s. 79.) (b)

**Q.**—A cheque on a banker, payable on demand to A. or order; the indorsement purports to be by A., but is forged. The banker pays the cheque—is he responsible?

**A.**—No; if a cheque payable to order on demand purports to be indorsed by the person to whom it is made payable, the banker is authorised to pay it to the bearer: (*Ib.*, s. 60.) (c)

**Q.**—A., owing money to B., draws a cheque on a London joint stock bank to B.'s order, crosses it "and Co.," and marks it "not negotiable." B. receives it, and indorses it, but it is stolen from him, presented through some bankers, and paid. What (if any) remedy has B. against the joint stock bank, or A.? Give a reason for your answer. Would it make any difference if the cheque had been stolen before it came to B.'s hands, and his indorsement forged?

**A.**—In the first case the bank is protected by sect. 80 of Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), and there would be no remedy against A., the cheque having come to the hands of B. In the second case B. could recover against A., as no payment in any form had reached him; but not against the bank, as they are protected by sect. 60 of the above Act.

**Q.**—What is an I O U, and in what respects does it differ from a promissory note?

**A.**—An I O U is a mere acknowledgment of a debt. It differs from a promissory note in requiring no stamp, that it need not be addressed to

(a) It is now decided that a cheque payable to A. B. or bearer, and indorsed by A. B., may be recovered on in an action by the holder against A. B. But, *per* Byles, J., the writing the name on the back of the cheque must be done *animo endorsandi*, to bind the indorser: (*Keen v. Beard, sup.*)

(b) If paid to another firm, they would be responsible if the indorsement was forged, but not if it was genuine, neither would the other firm in the latter case, although the cheque subsequent to indorsement had been stolen, unless it has been marked "not negotiable" under the new Act, when the holder can give no better title to the cheque than the person from whom he took it had (s. 81): (see *Smith v. Union Bank*, 45 L. J. 149.)

(c) But the bearer who receives the money is responsible if it is forged: (see *Arnold v. Cheque Bank*, 45 L. J. 562, and *Bobbett v. Tinket, ib.* 555); but not the bank collecting it: (s. 60)

anyone, is not negotiable, and cannot be sued upon : (Sm. Man. of O. L. 666-9.)

Q.—What is the difference between an inland and a foreign bill of exchange ?

A.—An inland bill is a bill which is, or on the face of it purports to be, (a) both drawn and payable within the British Islands (meaning any part of the United Kingdom, the islands of Man, Guernsey, Jersey, Alderney and Sark and the adjacent islands, being part of Her Majesty's dominions), or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill ; but unless the contrary appear on the face of the bill, the holder may treat it as an inland bill : (45 & 46 Vict. c. 61, s. 4.) It is unnecessary to protest a bill which does not show on the face of it that it is a foreign bill (*ib.*, s. 51) ; but a foreign bill may be stamped after it is drawn, though an inland bill cannot.

Q.—Give the form of a bill of exchange.

A.— £200.

London, Jan. 18, 1878.

Three months after date (or any time arranged by the parties)  
pay to me or my order the sum of two hundred pounds for value received.

To Mr. C. D.

A. B.

This is accepted by C. D. writing his name across it and usually specifying where it is payable.

Q.—Describe the parties to a bill of exchange, and state their relative liabilities.

A.—The parties are he who draws it, called the *drawer* ; he to whom it is addressed, called the *drawee*, but after he has accepted he is termed the *acceptor* ; and he to whom the money is to be paid called the *payee*. There are also, when the bill is made payable to *order*, other parties, who are the *indorsers* of the bill, the holder in such case being the *indorsee*.

The acceptor is primarily liable, and is the principal, all the other parties being merely sureties for him. But they are not as *between themselves* merely co-sureties, but each prior party is a principal in respect of each subsequent party. Thus an indorser is considered as a new drawer, unless he qualify his indorsement, as by adding the words, "without recourse to me : " (Byles, B., ch. 1, and 45 & 46 Vict. c. 61.)

Q.—What engagements and admissions are the acceptor, drawer, and indorser of a bill of exchange respectively taken to have made by drawing, accepting, and indorsing it respectively ?

A.—The acceptor of a bill, by accepting it—

(1) Engages that he will pay it according to the tenour of his acceptance ;

(2) Is precluded from denying to a holder in due course—

(a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill ;

(b) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement ;

(c) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but

not the genuineness or validity of his indorsement: (45 & 46 Vict. c. 61, s. 54.)

The drawer of a bill by drawing it,

- (a) Engages that on due presentment it shall be accepted and paid according to its tenour, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken ;
- (b) Is precluded from denying to a holder in due course the existence of the payee, and his then capacity to indorse.

The indorser of a bill, by indorsing it,

- (a) Engages that on due presentment it shall be accepted and paid according to its tenour, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken ;
- (b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements ;
- (c) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto : (*Ib.*, s. 55.)

Q.—If an infant join with an adult in a bill of exchange, can either be sued on the bill ?

A.—The adult may be sued, but not the infant : (*Chandler v. Parks*, 3 Eq. 76.)

Q.—If in a bill or note no time of payment is specified, when is it payable ?

A.—On demand : (*Ib.*, s. 10.)

Q.—If the holder of a bill of exchange binds himself to give to the acceptor time for payment, has it any, and, if any, what effect upon the liability of the drawer and indorsers, and upon what principle does the law proceed ?

A.—It will discharge them from liability unless done with their consent, on the principle that the acceptor of a bill of exchange stands in the position of principal debtor as regards the other parties to these instruments, and the subsequent parties are in law simply sureties to the holder for the parties thus primarily liable : (*Chit. Cont.* 502, 11th edit.)

Q.—Is oral evidence admissible to make a promissory note absolute on the face of it conditional or payable upon a contingency ?

A.—No ; for it is a rule that parol evidence cannot be given to vary or contradict a written instrument : (*Chit. Cont.* 99, 11th edit. ; but see 45 & 46 Vict. c. 61, s. 21.)

Q.—By whom can a bill of exchange be accepted ; and what constitutes acceptance of an inland, and what of a foreign, bill of exchange ?

A.—A bill can only be accepted by the drawee competent to contract, and not by a stranger, except for honour : (*Byles, B.*, 171, 8th edit.)



Acceptance, in this country, of bills inland or foreign, must now be in writing on the bill, signed by the acceptor or his agent: (*Ib.*, s. 17.)

Q.—What is the definition of an “acceptance,” given in the Bills of Exchange Act, 1882? A. accepts a bill in which the amount has not been filled in, and hands it to the drawer, who fraudulently fills in a larger sum than was due, and negotiates the bill. What are the holder’s rights?

A.—The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer, and is invalid unless—

- (a) It is written on the bill and signed by the drawee, though mere signature of the name is sufficient; and
- (b) It must not express that the drawee will perform his promise otherwise than by payment of money: (s. 17.)

In the case given, if negotiated to a holder in due course, the bill will be valid and effectual for all purposes: (ss. 20, 29.)

Q.—What will be deemed a sufficient acceptance by the drawee of a bill of exchange? Refer to any recent legislation affecting this question.

A.—The mere signature of the drawee without additional words is sufficient: (*Ib.*, s. 17.)

Q.—What is the meaning of a bill of exchange being accepted *per pro.*; and what is the consequence if this be done without authority?

A.—That it is accepted by procuration by an agent, and such signature operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the limits of his authority: (*Ib.*, s. 26.) If an agent signs for his principal without authority to do so, he is not liable as a party to the bill, but he is liable in an action for damages for breach of his implied warranty that he had authority: (Chalmers B. of E. Act, p. 16.) (a)

Q.—Is there any difference in the extent of the liability of an acceptor of a bill of exchange, as between himself and third parties, and as between himself and the drawer?

A.—In ordinary cases there is no difference. If, however, there has been no consideration for the acceptance, then (being for accommodation) the acceptor is not liable to the *drawer*, though he is to parties who took the bill *bonâ fide*, and paid a valuable consideration for it: (see Byles, B. 128, 130, 12th edit.) (b)

Q.—A bill is accepted without consideration, and for the accommodation of the drawer. What facts must be shown to entitle the acceptor to set up this defence against a subsequent indorsee?

A.—Since bills of exchange are presumed to be given for good consideration, it lies on the party who denies the fact to prove the negative. But if the defendant can show that there has been something of fraud in

(a) If the acceptance be *fraudulent* it is a felony: (24 & 25 Vict. c. 98, s. 24.)

(b) The following question may be easily answered from this and preceding answers: Which of the parties to a bill of exchange is primarily liable to pay it, and how is this liability affected by the bill being accepted for accommodation?



the previous steps of the transfer of the instrument, it throws upon the plaintiff the necessity of showing under what circumstances he became possessed of it. Therefore, in an action by indorsee against acceptor, if the defendant plead that the bill was obtained from him by fraud, and that the plaintiff gave no consideration for it, proof of the fraud is held to throw on the plaintiff the onus of showing that he gave consideration for the bill : (*Berry v. Alderman*, 23 L. J. 36, C. P. ; *Harvey v. Towers*, 20 L. J. 318, Ex.)

**Q.**—A bill of exchange for 100*l.* is accepted for the accommodation of the drawer, who indorses it to a third person for 25*l.* Can the indorsee recover against the acceptor ?

**A.**—An accommodation party is liable on the bill to a holder for value, and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not : (45 & 46 Vict. c. 61, s. 28 (2).)

**Q.**—In what cases is it necessary to present a bill of exchange to the acceptor for payment before an action can be maintained against him upon the bill ?

**A.**—If a bill or note be payable (at or) after sight, it must be presented in order to charge the acceptor or maker. So must a note payable at a particular place : (Byles on Bills, p. 217, 12th edit. ; and 45 & 46 Vict. c. 61, s. 52.)

**Q.**—To which parties to a bill of exchange or promissory note must a notice of dishonour be given ?

**A.**—To all parties to a bill save the acceptor ; and to all parties to a note save the maker ; therefore the holder of a dishonoured bill should give notice to the drawer and indorsers of it ; and the holder of a note to the indorsers only : (*Ib.*, s. 49.) In certain cases delay is excused or notice dispensed with : (*Ib.*, s. 50.)

**Q.**—If the acceptor of a bill of exchange refuse payment of it when due, is any and what step necessary before you can sue the drawer or indorser ?

**A.**—Yes ; notice of dishonour must be given to them. There is no particular form of notice, yet it must import in express terms, or by necessary implication, that the bill (or note) *has been dishonoured*. A written notice is not essential, but is advisable, as it facilitates proof : (Byles, B., 274, 280, 12th edit.)

**Q.**—Within what time ought notice of the dishonour of an inland bill accepted for value to be given to the drawer or indorser by the holder ?

**A.**—Where the holder and the party to whom notice is addressed live at different places, it is sufficient to send off notice on the day next after the day of dishonour. Where both parties live in the same town, or where they live in London, notice must be given in time to be received in the course of the day following the day of dishonour : (45 & 46 Vict. c. 61, s. 49.)

**Q.**—What is the meaning of “days of grace” in reckoning the time at which a bill of exchange is payable, and do they exist where the bill is payable on demand or at sight ?

**A.**—The days of grace are an allowance of three days for payment of

a bill or note after the day fixed by such bill or note; they are abolished on bills payable at sight, or on presentation. If the third day be a day of rest, it is payable the day previous, unless the third day be a bank holiday, when it is payable the day after: (*Ib.*, s. 14.)

*Q.*—Two bills of exchange are drawn, both payable six days after sight. One is presented on the 16th, the other on the 17th of Dec., 1882. When are they respectively payable?

*A.*—Three days of grace being allowed, the first bill would, in ordinary course, be due on the 25th of December, but that being Christmas day, it is made due on the 24th. The second bill would be due on the 26th, but that being bank holiday it would not be payable until the 27th: (*Ib.*, s. 14.)

*Q.*—A. draws a cheque on his bankers payable to B. The bankers refuse to cash it when presented, though they have ample funds in hand. What are the respective rights of A. and B.?

*A.*—A.'s remedy would be an action for damages against the bank: (*Mazetti v. Williams*, 1 B. & Ad. 415.)

B. could proceed against A. either for the amount of the debt or on the dishonoured cheque.

*Q.*—A. takes a cheque of B. on his bankers, and cannot without some inconvenience present it for payment until some days after, and when he does so, finds that the bankers have stopped payment in the mean time. Can he recover the amount afterwards against B.?

*A.*—If a cheque be payable at a banker's in the place where the party receives it, it should be presented for payment during banking hours on the day after it is received. If it be payable elsewhere, it suffices to forward it by the regular post on the day after it is received; and the party receiving it by post has till the next day to present it; if this be not done, and the banker fails, the party guilty of the negligence will have to bear the loss: (*Hare v. Henty*, 4 L. T. Rep. N. S. 363.) (a)

*Q.*—A. and Co., of Lisbon, draw on their agents at Liverpool for 300*l.* The bill is in three parts. One part comes through several holders to B. and Co., as *bonâ fide* holders for valuable consideration. On this part it is stated that the first of exchange had been sent to Messrs. Smith, of London, bankers for presentation for acceptance. But when the second part is presented, it appears that the first part had never come to hand. Against whom have B. and Co. a remedy? What should you advise if B. and Co. had omitted to present the bill when due?

*A.*—Such a bill must be presented for acceptance before being presented for payment; but now, when the holder of a bill drawn payable elsewhere than at the place of business of the drawee, has not time with the exercise of reasonable diligence to present it for acceptance before presenting it for payment, the delay caused by presenting it for acceptance is excused and does not discharge the drawer and indorsers (45 & 46 Vict. c. 61, s. 39 (4).) In case of the agents at Liverpool refusing to accept, B. and Co. would have a remedy against A. and Co. and the indorsers: (see sect. 55 of the Act.) But

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(a) A bank note should also be circulated or presented within the same period: (*Camidge v. Allenby*, 6 B. & C. 378.)

if B. and Co. neglected to present the bill when due, and were not excused by the above section, they would lose their rights against the drawer and indorsers.

Q.—A promissory note is made payable to a woman before her marriage. She afterwards marries and the husband dies, leaving her surviving. Can she bring an action upon the note?

A.—If married before 1883 and the note is not recovered upon in their joint lives, it, being a *chose in action*, reverts to the woman, and she may bring an action upon it (see Byles, B. 65, 12th edit.). If married after 1882, it is her separate estate, and she could at any time sue upon it as a *feme sole*: (Married Women's Property Act, 1882.)

Q.—A promissory note is made payable to a husband and wife, and the husband dies before it is paid, his wife surviving him. Can she maintain an action upon it?

A.—Yes; the widow may, in such a case, sue for the amount of the note: (*Gaters v. Madeley*, 6 M. & W. 423; *Steph. Lush*, Pr. 36.)

Q.—A client brings an overdue bill of exchange to his solicitor; give a detailed account of the steps that must be taken to enforce payment, and suggest any difficulties occurring to you that may arise as to its recovery; also some of the different ways in which the client might be holder?

A.—The solicitor should first inquire whether proper notice of dishonour has been given; if such notice has not been given, and one is requisite, and the time for giving it has not elapsed, he should give the notice. To enforce payment an action must be brought, which is done by the solicitor suing out a writ and proceeding thereon to judgment and execution. As the bill is over-due, the solicitor should inquire of his client whether he took it previously or subsequently to its becoming due; for if the client took it subsequently he will hold it subject to all the equities attaching to the bill. (a) The client may be holder of the bill as drawer (being also payee), or as payee (not being the drawer), or as indorsee.

Q.—What is the proper mode of suing on a bill of exchange or promissory note with respect to indorsing the writ of summons, the time for signing judgment for want of appearance, and obtaining leave to appear and defend?

A.—Formerly the procedure was under 18 & 19 Vict. c. 67, but this Act is now repealed. The writ should now be specially indorsed under Order III., r. 6.

Q.—Promissory note payable on demand. From what time does the Statute of Limitations begin to run? Give the reasons for your answer?

A.—From the date of the note. The reason being that a promissory note payable on demand is payable immediately.

Q.—Can an action be maintained on a lost bill of exchange or promissory note, and can the plaintiff prevent the defendant from setting up the loss of the instrument, and, if so, how?

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(a) Set-off, however, is not one: (*Re Overend, Gurney, and Company, ex parte Swann*, L. Rep. 6 Eq. Cas. 344.)

A.—An action may now be brought on a lost bill or other negotiable instrument, for, by the 17 & 18 Vict. c. 125, s. 87, and 45 & 46 Vict. c. 61, s. 70, the court or a judge may order that the loss of such instrument shall not be set up, provided that an indemnity is given to the satisfaction of the court or judge, or a master, against the claim of any other person upon such negotiable instrument: (a) If the bill or note be not *negotiable*, the loss of it is no defence to an action upon it, for no one can have a good title to it except the payee: (See Byles, B., 379, 12th edit.)

Q.—A. sues B. for a debt simply; B. pleads a bill of exchange given in payment, which A. has lost. What course should you advise A. to pursue?

A.—As this is a good answer to the action as brought, the best plan would be to obtain leave to amend the statement of claim by adding a claim on the bill, and then enter into the usual indemnity, when the defence would no longer be available.

Q.—Is a tender after a bill of exchange becomes due a defence for the acceptor in an action by the indorsee?

A.—Formerly it was not (*Hume v. Peploe*, 8 East, 167); but under the new practice this will doubtless be otherwise.

Q.—If a bill of exchange be renewed can an action be maintained upon the original bill whilst such renewed bill is running? Give the reason.

A.—It cannot, as the right of action is suspended until the plaintiff satisfies defendant that he has no claim against him on the second bill; *ex. gr.*, by delivering it up: (Smith's Merc. Law, 7th edit., p. 271.)

Q.—If a bill of exchange is given by a debtor in satisfaction and discharge of his debt, and it is so received by the creditor, does the dishonour of the bill revive the original debt?

A.—It does: (Chit. Cont. 705, 11th edit.)

Q.—A. gave to B., a creditor, a promissory note for the difference between the amount of his debt and the amount to be received by B. under the composition to induce him to join with A.'s other creditors in a composition deed. Can A., having paid the note when due, recover back the amount from B.? What would have been the rights of parties if B. had sued A. upon the note? Give a reason for your answer.

A.—A. can recover back the amount paid, as this is a fraud upon the creditors and against public policy: (*Smith v. Cuff*, 6 M. & G. 160.) If B. had sued upon the note, A. might have set up the fraud in defence: (see Robson on Bankruptcy, 233, 3rd edit.)

Q.—How is the debt affected in law, when the payee of a promissory note dies, leaving the maker of his note his executor?

A.—Formerly, at law (but not in equity) the debt was extinguished, for it could only be recovered by action, and the executor could not sue himself; and when the remedy was suspended by the voluntary act of the creditor, it was for ever gone: (see Matt. Exors. 192, 2nd edit.; *Freakley*

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(a) If a bank note has been cut into halves, and one half is lost, the banker is bound to pay on production of the half note, even without an indemnity: (per Willes, J., in *Redmayne v. Burton*, 2 L. T. Rep. N. S. 824.)

v. *Fox*, 9 B. & C. 130.)(a) It could, however, be recovered as a trust in equity, and so now in the Chancery Division of the High Court.

Q.—State in what particular bills of exchange and promissory notes differ from other simple contracts.

A.—In these particulars : 1. They must always be in writing. 2. They import a consideration. 3. They carry interest from the time they are due and payable, without a promise to pay interest. 4. They are, if payable to order, assignable at law. 5. They must always be stamped : (see Byles, B.)

Q.—Where a bill of exchange is payable to bearer can a person who is holder for value sue upon it whether the party from whom it was taken had a title to it or not ?

Q.—Yes ; if the holder took it *bonâ fide* and for value, and before it became due, because such an instrument is, like money, transferable from one to another, by mere delivery (*Miller v. Race*, 1 Sm. L. C. 240 ; *Grant v. Vaughan*, 3 Bur. 1516) ; but if crossed and marked “not negotiable” under 45 & 46 Vict. c. 61, s. 81, the holder can give no better title than the person had from whom he received it.

Q.—What is the effect of crossing a cheque generally, and what the effect of crossing it with the name of a banking firm ? Can the name of that firm be erased and the name of another banking firm be substituted without affecting the validity of the cheque ?

A.—The effect of crossing a cheque generally is to make it payable only through some banker. If crossed with the name of a banking firm it can only be paid to or through that firm.

The crossing of a cheque is now a material part of it, and it is not lawful for any person to obliterate, add to, or alter such crossing, except as is authorised by the Act : (*Ib.*, ss. 76-82.)

Q.—If a bill of exchange is paid by one of the parties to it before it is due, and is allowed to remain in the hands of the indorsee, who indorses it away after the payment ; can a subsequent indorsee for value recover from the party who has previously paid the bill ?

A.—Yes, if the indorsee took it *bonâ fide* and for value (*Morley v. Culverwell*, 7 M. & W. 174) ; but payment of a note payable on demand will be a defence against an indorsee for value without notice : (*Bartram v. Caddy*, 9 Ad. & E. 275.)

Q.—If A. guarantees the due payment of a bill of exchange, is A. liable for the interest if the bill be not paid at maturity ?

A.—Yes : *Ackerman v. Ehrensperger*, 16 M. & W. 99 ; Chit. Cont. 496, 11th edit.)

#### 4. *Contracts between Landlord and Tenant.*

Q.—If A. contracts with B. to grant B. a lease of certain lands, and A.

(a) But it is conceived that, if the note at the time of the testator's death had been in the hands of an indorsee, the executor would still have been liable as maker to the indorsee ; and that if the note had been payable at a period certain, and indorsed by the executor after the testator's death, but before the note was due, the executor would have been liable as maker to an indorsee without notice ; for since a premature secret payment by the maker should not have protected him, no more, it should seem, would a premature secret release : (Byles, B., 55, 12th edit.)

refuses afterwards to grant the lease, what remedies has B. for such breach of contract?

A.—In the Common Law Division of the High Court of Justice, B. may sue A. for breach of the contract. So, if he has paid any fine or premium, he may sue A. for money had and received: (Arch. L. & T. 61, &c., 2nd edit.; *Lock v. Furze*, L. Rep. 1 O. P. 441.) But he cannot in these divisions enforce specific performance: (see *Benson v. Paul*, 27 L. T. Rep. 78; 36 & 37 Vict. c. 66, s. 34.) In the Chancery Division, however, he can not only obtain specific performance, but also damages either in addition to or in substitution for such remedy.

Q.—What are the quarter-days of the year? How is a tenancy from year to year determined on either side? If a tenancy from year to year commence at Lady-day, 1857, when would it be determinable? (a)

A.—The quarter-days are the 25th March (Lady-day), the 24th June (Midsummer-day), the 29th September (Michaelmas-day), and the 25th December (Christmas-day).

A tenancy from year to year can only be determined by six calendar months' notice being given, to expire at the end of the current year's tenancy. Therefore, if a tenancy from year to year commenced on Lady-day, it must end on a subsequent Lady-day: (see Arch. L. & T. 91, 2nd edit.) By the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), s. 51, a year's notice instead of six months must be given, but the Act only extends to holdings over two acres, agricultural or pastoral: (s. 58.) This Act is now repealed, except as to rights acquired thereunder by the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61); but the same length of notice (one year) is now required by sect. 33 of that Act, which applies to all holdings, agricultural or pastoral, or partly agricultural and partly pastoral or market gardens: (s. 54.) This provision may, however, be ousted by agreement.

Q.—At what time may a good notice to quit be given in the case of a monthly or weekly tenancy, respectively?

A.—A monthly tenancy may be determined by a month's notice to quit, and a weekly tenancy by a week's notice, expiring at the end of the week or month respectively; but it is doubtful whether this notice is necessary in the case of *lodgings*. The Court of Common Pleas have held that a tenancy from week to week does not determine without *some reasonable notice*; and that an ejectment cannot be maintained against the tenant without any previous notice; but they avoided saying what notice is necessary: (*Jones v. Mills*, 31 L. J. 66, O. P.) A week's notice would of course be sufficient: (Wood, L. & T. 180, 302, note *p*, 10th edit.; Arch. L. & T. 92, 2nd edit.)

Q.—A house is let to a tenant for one year certain from the 1st January, 1883, and so on, from year to year, as long as both parties please. What is the earliest day on which the tenancy can be determined?

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(a) The following question may be answered from the text: What notice to quit should be given to a tenant who holds under a yearly tenancy, and should such notice refer to any particular period?



**A.**—A lease for one year, and so on from year to year, as long as both parties shall please. is a lease for *two* years certain. Therefore, the earliest time for determining the tenancy would be by giving notice on the 1st July, 1884 (or, if under the Agricultural Holdings Act, 1875, from land being comprised with it, 1st January, 1884) of the intention to quit on the 1st January, 1885 : (see Arch. L. & T. 30, 91, 2nd edit. ; Wood. L. & T. 300, 10th edit.)

**Q.**—A. lets premises to B. from year to year ; B. underlets these premises to C. ; to whom must A. give notice to quit in order to recover in ejectment.

**A.**—The notice must be given to B. and not to C., the under-tenant : (Arch. L. & T. 93, 2nd ed., citing *Pleasant v. Benson*, 14 East, 234.)

**Q.**—Is it necessary that a notice to quit should in all cases be in writing ?

**A.**—No ; a parol tenancy may be determined by a verbal notice to quit (*Macartney v. Crick*, 5 Esp. 196) ; but a written notice should always be given, as it facilitates proof : (see Arch. L. & T. 94, 2nd edit.) So a written notice is essential, in order to take advantage of the 4 Geo. 2, c. 28, as stated *post*.

**Q.**—If a house and stables are let from year to year under one letting, can the landlord give a valid notice to quit the stables only ?

**A.**—The landlord cannot give a valid notice to quit the stables only, for a notice to quit a part of the demised property is bad : (see Arch. L. & T. 95, 2nd edit.) By sect. 52 of the Agricultural Holdings Act, 1875, and sect. 41 of the 1883 Act, a landlord may give notice to quit a part only in order to make improvements therein mentioned, but the tenant will be entitled to compensation, and may within twenty-eight days accept it for the entire holding.

**Q.**—Is a notice to quit by one of several joint lessors good or bad ? State the reason.

**A.**—A notice to quit by one of several joint tenants, if signed by one on behalf of all (whether authorised or not) is good, because the tenant holds the whole premises of all so long as he and all shall please : (see Wood. L. & T. 295, 8th edit.)

**Q.**—A written notice to quit being given to a tenant by his landlord, what liability does the tenant incur by holding over ?

**A.**—He is liable to pay the landlord *double the yearly value* of the premises for so long a time as the same are detained after demand of possession made and notice in writing given ; to be recovered by action of debt : (4 Geo. 2, c. 28.) If the *tenant* gives the notice, which need not be in writing, and holds over, he is liable to pay to the landlord *double the rent*, to be recovered by action or distress : (see 11 Geo. 2, c. 19, s. 18 ; Arch. L. & T. 211, 216, 2nd edit.)

**Q.**—At what time of the day, on which it is due, must rent be paid, in order to prevent proceedings ?

**A.**—Rent is not actually due until midnight of the day upon which it is reserved : (see Matt. Exors. 7, 2nd edit.) The payment should, how-

ever, to prevent proceedings, be made such time before sunset as to allow sufficient light to count the money : (Co. Lit. 202, a ; *Tutton v. Darke*, 2 L. T. Rep. N. S. 361, 362.)

Q.—Receipt for half a year's rent to Christmas last ; does it prove payment of the rent to the previous Midsummer ?

A.—It is a *prima facie* proof of the payment of the rent to the previous Midsummer ; but this presumption may be rebutted by the landlord : (Arch. L. & T. 151, 2nd edit. ; Tay. Ev. 746.)

Q.—An occupier of two houses under two different landlords, one at a rent certain, the other without any agreement for any specific sum ; have the two landlords the like remedy for rent, or how does it differ ?

A.—There is this difference—the landlord to whom the tenant pays a certain rent may distrain for such rent, but the landlord who has let the house without any agreement for a specific sum cannot distrain ; his only remedy will be an action for use and occupation ; for, in order to support a distress, the rent must be certain : (Arch. L. & T. 113, 2nd edit.)

Q.—What is the usual remedy for recovering rent reserved on a lease, and how is it enforced ?

A.—Rent reserved on lease containing a covenant to pay may be recovered by distress, and by action of debt or covenant. So a power of re-entry is always reserved by the lease on breach of the covenant to pay rent, and ejectment may now be brought without a previous demand if half a year's rent is in arrear and no sufficient distress on the premises : (Arch. L. & T. 33, 37, 111, &c., 2nd edit.)

Q.—Must a lease for seven years be in writing ? and what is the limit of time for which a parol lease may be legally made ?

A.—Such a lease must not only be in writing, but by deed also : (29 Car. 2, c. 3 ; 8 & 9 Vict. c. 106, s. 3.) A parol lease not exceeding three years from the making, with a rent of not less than two-thirds of the improved value, is good : (29 Car. 2, c. 3.)

Q.—A. grants a lease to B. for twenty-one years, at a rent of 100*l.* *per annum* ; at the end of three years B. assigns the remainder of the term to C., subject to the rent : after this assignment, rent becomes due to A., who, not being able to obtain payment from C., calls upon B. to pay ; B. objects that he has assigned to C. Is B. liable to pay the rent ?

A.—B. is liable to pay the rent, notwithstanding the assignment to C., for, immediately on the execution of the lease to B., a *privity of contract* arises between him and the lessor, and this privity of contract continues during the whole of the term : (see *Spencer's case*, 1 Sm. L. C. 68, and notes.)

Q.—If the original lessee covenant to insure against fire, but omits to do so, and he by covenant is further bound to uphold, and the premises are burned down, he having assigned, and the assignees will not reinstate : state whether the original lessee or the assignee is liable to do so.



A.—The original lessee is bound to do so under his express contract; and so is the assignee, for such a covenant runs with the land, especially if the lessee covenant to lay out the insurance money in rebuilding or repairing the premises: (Wood L. & T. 545, 10th edit.)

Q.—Is a tenant liable to pay the rent of premises accidentally destroyed by fire, under any and what circumstances? (a)

A.—If a tenant covenant generally, that is without any exceptions, to pay rent during the term, it must be paid, notwithstanding the premises are accidentally burnt down during the term: (*Monk v. Cooper*, 2 Str. 763; Arch. L. & T. 153, 2nd edit.)

Q.—How far do the covenants in a lease bind the lessee holding over after the expiration of the term?

A.—Unless there be evidence to the contrary, the tenancy will be held upon the terms of the old lease so far as they are not inconsistent with a yearly holding. Thus, where the old lease contained a covenant to repair, the tenant holding over was held liable as on a simple contract for not rebuilding the premises on their being destroyed by fire: (Chit. Cont. 303, 11th edit.)

Q.—What sort of annexation of a chattel to the freehold is necessary to constitute a fixture in its legal sense?

A.—To constitute such an annexation as will preclude a removal by the tenant (not within the Agricultural Holdings Acts, 1875 and 1883) the article must be fixed in the ground, or to some substance previously a part of the freehold; for otherwise it does not cease to be a chattel and removable: (Chit. Cont. 335, 11th edit.: *Ex parte Barclay*, 5 De G. M. & G. 403; *Elwes v. Maw*, 2 Sm. L. C. and notes.)

Q.—What fixtures may a tenant remove, and when must such removal be made?

A.—As between landlord and tenant the latter may take away such fixtures as he has himself put up, either for the purpose of trade, ornament, or furniture of his house, if thereby the freehold be not materially damaged. The removal must be either during the continuance of the term, or at the end of it; for the tenant *cannot remove them after he has quitted the premises*: (see Arch. L. & T. 352, 2nd edit.)

By the 14 & 15 Vict. c. 25, s. 3, buildings, engines, or machinery put up by the tenant of a farm for the purpose of trade or agriculture, with his landlord's consent in writing, and not in pursuance of some obligation, may be removed by the tenant making good any injury to the premises, if on a month's previous notice in writing being given to the landlord he does not elect to purchase the same.

By the Agricultural Holdings Act, 1875, s. 53, any engine, machinery, or other fixtures, fixed after the Act by an agricultural tenant (not in pursuance of an obligation to do so or instead of another of the landlords) is removable by the tenant under the like conditions if he has paid his rent, and satisfied his liability to his landlord; and by sect. 34 of the 1883 Act, fencing and buildings are included in addition.

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(a) This question will also appear in the Conveyancing division, and has also been asked in the Equity division.

**Q.**—If a landlord let a house on an agreement, and the tenant runs away, leaving no sufficient property on the premises to pay the rent, how is the landlord to obtain possession so as to put an end to the agreement?

**A.**—If half a year's rack rent be in arrear the lessor, &c., should request two justices of the peace of the county, &c., having no interest in the premises, to go upon and view the same, and affix upon the most notorious part thereof notice in writing on what day (at the distance of fourteen days at least) they will return to take a second view thereof; and if on such second view the tenant, &c., does not appear and pay the rent, or there be not sufficient distress on the premises, then the justices may put the landlord into possession, and avoid the lease: (see Arch. L. & T. 171, 2nd edit.)

**Q.**—What constitutes a waiver of a proviso of re-entry?

**A.**—If the landlord, with full knowledge of the forfeiture which gave him the right of re-entry, accepts or distrains for rent due after the forfeiture, it will waive the forfeiture and right of re-entry: (Arch. L. & T. 103, 2nd edit.; and see hereon *Dumpor's case*, 1 Sm. L. C. 47; and the 23 & 24 Vict. c. 38, s. 6.)

**Q.**—If a landlord let a house by parol for three years, and nothing is mentioned as to repairs, state what repairs each party would be liable to, and what would be dilapidations on the part of the tenant?

**A.**—The lessor is not bound to repair the house; (a) but the lessee ought to do so; for the law implies a promise by him to that effect, unless the house was in a ruinous state when he entered into possession. If the tenant commits voluntary waste or dilapidations, as if he removes doors or windows, he is liable to make good the damage: (see Arch. L. & T. 198, 2nd edit.)

**Q.**—What repairs or dilapidations is a tenant from year to year liable to make good in respect of a messuage so let to him?

**A.**—It seems that he is only bound to make fair and tenantable repairs, to keep the house wind and water tight, so as to prevent obvious waste or decay of the premises, and not to make substantial or lasting repairs, such as new roofing or the like; and he is not liable for mere wear and tear of the premises: (see Wood. L. & T. 493, 10th edit.; Arch. L. & T. 198, 200, 2nd edit.)

**Q.**—Is a landlord or incoming tenant, and which, liable at the expiration of a lease, to pay the outgoing tenant in respect of manure, crops, &c., who holds under a lease; and what will be the difference if he be only a tenant at will?

**A.**—If there are any covenants in the lease relating to the manure, &c., both landlord and tenant will be bound by them; but if there be no contract the parties will be bound by the custom of the country. The landlord is *prima facie* bound to pay the outgoing tenant, whether for years or at will, for manure, crops, &c., unless the incoming tenant, with the landlord's assent, enter upon them, for then the implied contract to pay

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(a) As to the landlord's liability to repair under a lease, see *Tildesley v. Clarkson* (6 L. T. Rep. N. S. 98).

rests with him : (see *Wigglesworth v. Dallison*, 1 Sm. L. C. 594, and notes ; *Codd v. Brown*, 15 L. T. Rep. N. S. 536.) But if the tenant at will determines the tenancy *by his own act*, he is not entitled to the crops : (Arch. L. & T. 327, 2nd edit.) (a)

## THE LAW OF TORTS OR PRIVATE WRONGS.

*Question.*—What was decided in the *Six Carpenters case* ?

*Answer.*—That if a man abuse an authority given him by the *law* (as to enter a common inn), he becomes a trespasser *ab initio*. The contrary is the rule if the authority was given by the party. Mere *nonfeasance* does not amount to such abuse as makes a man a trespasser *ab initio* : (*Six Carpenters case*, 1 Sm. L. C. 143.)

This rule formerly applied to distress, but now, where an irregularity, &c., occurs in taking a distress, the distrainer is not a trespasser *ab initio*, if any rent is justly due : (11 Geo. 2, c. 19, s. 19.)

*Q.*—Is an infant liable for torts committed by him ?

*A.*—Yes ; but not for such as arise out of contract. Thus, he is liable for a personal trespass, but he is not liable in trover for goods delivered under a contract : (see *Burnard v. Haggis*, 8 L. T. Rep. N. S. 320 ; Chit. Cont. 149, 11th edit.)

*Q.*—An orphan of tender years has had his leg broken by wilful negligence. Can he bring an action for the injury, and if so, how ?

*A.*—He may maintain an action by next friend, who must sign a written consent that his name be used for that purpose : (see Order XVI., rr. 16 and 20.) Formerly he sued in trespass or case.

*Q.*—A father and his child under ten years of age receive injuries by a collision on a railway : in seeking compensation at law for such injuries, must there be more actions than one, and in whose name or names is or are such action or actions to be brought ?

*A.*—There should be two actions, as they are instituted in different rights and capacities. The father must sue in his name to recover damages for the injuries done to him, and an action must be brought for the child by his next friend for compensation for the injuries he has sustained. The father may, however, act as next friend : (Pat. & Mac. Pr. 136.)

*Q.*—What is the difference between libel and slander ?

*A.*—Libel is the malicious defamation of any one made public by printing, writing, signs, or pictures, in order to expose him to public hatred or ridicule. Slander is a similar defamation by word of mouth. Libel is not statute-barred until after six years, slander after two years. Again, libel may be punished *criminally* as well as civilly, while slander is only punished criminally in a few cases : (Arch. Nisi Prius, 442.)

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(a) See Agricultural Holdings' Acts, 1875 and 1883, as to improvements made by tenants, and when he is entitled to claim for them, and as to deductions that may be claimed from them.

Q.—Is it a sufficient publication of a libel to write a libellous letter of a husband to a wife? What is the leading case?

A.—It is; husband and wife in this instance being considered as separate persons in law. The leading case on the subject is *Wenman v. Ash* (13 C. B. 836).

Q.—What is it necessary to prove, in an action of slander, to entitle the plaintiff to recover?

A.—1. The words must be false, for truth is a good plea to an action for defamation.

2. Disparagement, or words such as impute conduct, or qualities tending to disparage or degrade the plaintiff, or to expose to contempt, ridicule, or public hatred, or to prejudice his private character or credit, or to cause him to be feared or avoided.

3. Publication, or the making known the slander to any person other than the object of such slander.

4. Special damage, except in cases imputing an indictable offence, unfitness for society, or misconduct or incapacity in a man's business: (Underhill on Torts, 2nd edit., 84.)

Q.—For what words may an action for slander be maintained?

A.—For all words imputing to another the commission of some crime punishable by law, such as treason, murder, forgery, perjury, &c., or words which may have the effect of excluding him from society, as to charge him with having leprosy, the itch, &c.; or words which impair or hurt his trade, as to call a tradesman a bankrupt, a lawyer a knave, or a physician a quack; also for any words disparaging in themselves and maliciously spoken by which special damage has been sustained: (Arch. Nisi Prius, 443; 3 St. C. 385 *et seq.*, 8th edit.)

Q.—In an action by a servant against his master for defamation in respect of a character given, what must the plaintiff prove to entitle him to recover?

A.—If the master has been applied to for the character (the statement then being privileged) the plaintiff must prove that the master gave the defamatory character untruly and with express malice, *i.e.*, knowing it to be false; but this will not be necessary in some cases when the character is given without being applied for: (Sm. Man. C. L. sect. 1093; *Gardner v. Slade*, 18 L. J. 313, Q.B.)

Q.—What is the usual defence to an action for false imprisonment?

A.—The usual defence is that of justification, *e.g.*, a private person is justified in arresting where there is reasonable and probable cause to suspect that the plaintiff committed a felony: (21 Jac. 1, c. 21, s. 3.)

Q.—A. prosecutes B., for perjury; B. is acquitted, and sues A. for malicious prosecution. At the trial the jury find, in answer to the judge, that A. had reason to believe and did believe that B. was guilty of perjury. For whom should judgment be entered? Give reasons.

A.—On this finding judgment should be entered for the defendant A., for, having reasonable cause, he was justified in prosecuting: (see *Hicks v. Faulkner*, 51 L. J. 271, Q. B.).

**Q.**—What is necessary to support an action for fraudulent misrepresentation?

**A.**—Fraud in law consists in knowingly asserting that which is false in fact to the injury of another. As a general rule the plaintiff must prove (1) that the representation is contrary to fact; (2) that the party making it knew it to be so; and (3) that such false representation induced the other to contract, and that he sustained damage thereby: (see notes to *Chandelor v. Lopus*, 1 Sm. L. C., and *Perry v. Free*, *ib.*, vol. 2. But see also 9 Geo. 4. c. 14. s. 6.) Equity formerly required less strict proof of the fraud than common law did and the rules of equity now prevail: (36 & 37 Vict. c. 66, s. 25, sub-sect. 11.)

**Q.**—The defendant sold to the plaintiff a stone which he affirmed to be a Bezoar stone, but which turned out not to be a Bezoar stone. Can the plaintiff maintain the action, and, if so, what must he prove to entitle him to recover?

**A.**—These were the facts in the leading case of *Chandelor v. Lopus* (1 Sm. L. C. 183), and it was held that no action lay against the defendant, unless he either knew that it was not a Bezoar stone, or warranted it to be such; but if the plaintiff in this case were to claim upon a warranty of the stone, he would at the present day perhaps succeed, the rule of law being that every affirmation at the time of sale of personal chattels is a warranty provided it appears to have been so intended; if not, he would at all events succeed, if he were to sue in tort, laying a “scienter,” since the fact of the defendant being a jeweller would be almost irresistible evidence that he knew his representation to be false: (Sm. L. C. *ib.*, notes.)

**Q.**—Give an instance of “*damnum sine injuriâ*.”

**A.**—If one trespasses upon another’s land, that is an invasion of an absolute right; but if the trespass was committed in self defence in order to escape from some pressing danger, no action will lie in respect of it, because the law authorises the commission of a trespass for such purpose; and therefore, although there was “*damnum*,” namely, a private grievance, there was no *injuria*, or wrongful act, and the trespass was consequently “*damnum sine injuriâ*.” (37 Hen. 6, 37, pl. 26.) See also *Butt v. Imperial Gas Company*, L. Rep. 2 Ch. App. 158; and Underhill on Torts, 2nd edit.)

**Q.**—A man commits an assault in the street, and in so doing breaks unintentionally a square of valuable plate glass in a shop window; another slips down accidentally and does the like. Has the owner of the glass a remedy at law against both or either of the persons?

**A.**—In the first case, the person being in the act of committing an unlawful act, the owner of the glass has a remedy against him; but where the window was broken by unavoidable accident, he has no remedy: (see Arch. Nisi Prius, 378, 402; *Vaughan v. Taff Vale Railway Company*, 32 L. T. Rep. 163; *Hammack v. White*, 5 L. T. Rep. N. S. 676.)

**Q.**—Is a master answerable for damages caused by the negligence or criminal act of his servant? (a)

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(a) This question is also answered by the foregoing: If a coachman negligently drives his master’s carriage, and thereby injures another, when is the master liable?

A.—If a servant, while employed in his master's service, by his negligence does any damage to a stranger, the master is (*civiliter*) answerable. But he is not liable for a crime or *wilful* injury committed by the servant without his command or encouragement, though it may be in the course of or in relation to the service: (see 2 St. O. 234, 8th edit.; *Reg. v. Stephens*, L. Rep. 1 Q. B. 703.)

Q.—Will the liability of the master, as stated in the preceding question, be altered by the injured party being also his servant?

A.—A master is not responsible in the case of one servant sustaining an injury from the negligence of a fellow servant of competent skill in the course of their common employment, unless the latter had a superintendence entrusted to him, or the case otherwise comes within the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42).

Q.—What must be given in a notice in respect of an injury under the Employers' Liability Act? Is a verbal notice sufficient, and within what time must it be received?

A.—The notice must give the name and address of the person injured, and must state in ordinary language the cause of the injury and the date at which it was sustained; but defects and inaccuracies are, in the discretion of the judge, not to be deemed fatal: (43 & 44 Vict. c. 42, s. 7.) Written notice is necessary: (*Moyle v. Jenkins*, 51 L. J. 112, Q. B.; and *Keen v. Millwall Dock Company*, 51 L. J. 277, Q. B.) The notice must be given within six weeks, but in case of death the want of such notice will be no bar if the judge is of opinion there is reasonable excuse: (sect. 4.)

Q.—A., your client, being sued by C., under the following circumstances, comes to you for advice. What points of law and fact should you tell him would arise on the case, and what is your opinion on the point of law? A. is a brewer, B. his collector. B. goes his rounds in a gig belonging to A., in which B. puts the money he collects. To protect the money B. always keeps a dog of his own in the cart. B. goes on his business into a house, and the dog is left on the seat of the gig. C., a stranger, speaking to another man, lays hold of the rail of the gig for support, and the dog bites him.

A.—I should say the following point of law would arise:

1. Is A. liable?

And the following points of fact:

1. Was B. acting within the scope of his employment in keeping the dog for the protection of the cart?
2. Was B. aware of the animal having a savage disposition?
3. Was C. guilty of contributory negligence?

On the point of law I should advise that A. would not be liable unless the first two points of fact were answered in the affirmative, and the third in the negative.

Q.—A carman in the employ of a manufacturer has been injured by the fall of a bale of goods from a crane worked by another man in the same employ. What facts should you ascertain before advising against whom any action should be brought?



A.—In the case put it would be necessary to ascertain whether the crane was staunch and secure, &c., as if it were not, and the master knew or ought to have known that it was not, or if he employed a person of insufficient strength to work it, an action could be maintained against him : (see *Ohit. Cont.* 533, 11th edit., and cases there cited.)

Q.—A. employs a contractor to do work who selects his own workmen, and has control over them ; is A. or the contractor responsible for the negligence of the workmen so employed ?

A.—The contractor, and not A. is responsible. If a person, in the exercise of his rights, employs a contractor, who is guilty of negligence, the contractor and not his employer is liable : (*Allen v. Hayward*, 7 Q. B. 960 ; *Grey et ux. v. Pullen*, 32 L. J. 171 ; *Sm. M. L.* 108, 8th edit.)

Q.—What is the rule of law where one of two innocent persons must suffer by the act of a third ?

A.—That he who has enabled such third person to occasion the loss must sustain it : (per Ashurst, J. in *Lickbarrow v. Mason*, 2 T. R. 70.)

Q.—If I start game in my own land, have I a right to follow it into the land of my neighbour ?

A.—No ; such act would be a trespass : (see *Arch. Nisi Prius*, 297, 320.) However, if a man upon his own land shoots at game which rises from his own land, and which is over his land at the time of shooting, but drops dead on the land of another, he may go and pick up without committing a *trespass in pursuit of game* : (*Kenyon v. Hart*, 11 L. T. Rep. N. S. 733, Q. B.)

Q.—Explain the meaning of the maxim *Actio personalis moritur cum persona* ; and give an instance of its application.

A.—The meaning is, that a *personal right of action dies with the person* : for example, if A. commits a trespass upon the person of B., and B. dies before action brought, his executor or administrator cannot sue A. for the trespass ; and before the 9 & 10 Vict. c. 93, not even if B. had died from the effects of the tort : (*Bro. Max.* 752, *et seq.*, 2nd edit.)

Q.—Has any and what alteration been made in the above maxim by the 9 & 10 Vict. c. 93 (commonly called Lord Campbell's Act) ?

A.—Yes ; by this Act, whenever the *death* of a person is caused by any wrongful act or neglect done under such circumstances as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages, then the person who would have been liable, if death had not ensued, is still liable to an action for damages, although the death has been caused under such circumstance as amount in law to felony : (sect. 1.)

Q.—In case of injury to a person from which death ensues, is there any mode by which compensation can be sought, and by what means, and by whom, and for whose benefit, and against whom must it be brought, and under what circumstances, if any, can the person to be benefited sue in his or her own right, and what species of loss is recoverable in such an action ? (a)

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(a) The following question is answered by the above :—The husband of a married woman, who depends upon him for her support, is killed in accident caused by the

A.—As before stated, in such a case, an action for damages may be maintained for the benefit of the wife, husband, parent, and child of the person whose death has been caused: (sect. 2.) (a) It is to be brought by and in the name of the executor or administrator of the deceased against the person who would have been liable if death had not ensued, and within twelve calendar months after the death: (sect. 3.) But if there be no such executor, &c., or if one, and he does not sue within six calendar months after the death, the action may be brought by the persons beneficially interested in its result: (27 & 28 Vict. c. 95, s. 1.)

As regards the species of loss recoverable under this statute, to entitle the representatives to recover, it must be the loss of some pecuniary advantage, either presently or in expectation. Damages are not to be given as a *solatium* to the feelings of the deceased's representatives, or in reference to the loss of a legal right: (*Franklin v. The South-Eastern Railway Company*, 31 L. T. Rep. 154.) (b)

Q.—A. commits an assault upon B., and before action brought B. dies. Can B.'s executors or administrators sue A. for the recovery of damages for the assault?

A.—In such a case the executors or administrators cannot sue A. for the assault, unless B. died from the effects of the assault. For the common law maxim *Actio personalis moritur cum personâ* applies: (Bro. Max. 706, 2nd edit.)

Q.—State the exceptions to the maxim *Actio personalis moritur cum personâ*.

A.—Where there has been a trespass to the goods and chattels of the deceased, the right of action survives to his executors or administrators: (see 4 Ed. 3; 25 Ed. 3; and 43 Ed. 3.) So the right survives in case of injury to real estate if committed within six months before the owner's death, and provided the action be brought within one year after his death: (3 & 4 Will. 4, c. 42, s. 2. Also under the 9 & 10 Vict. c. 93.)

Q.—Whilst A. is riding in his carriage, his coachman, in driving, knocks a man down and injures him. Upon another occasion, when A. is not riding in his carriage, his coachman does a similar thing. Can the party injured bring an action of trespass against A. in both or either and which of these cases?

A.—In the first instance, that is, when the master was present, an action of trespass could formerly be maintained against him for the

negligence of a railway company or their servants. Has she any remedy against the company? and if so, state whether under any statute, or at common law.

(a) The word "parent" is to include "father and mother, and grandfather and grandmother, and stepfather and stepmother;" and the word "child" is to include "son and daughter, and grandson and granddaughter, and stepson and stepdaughter:" (sect. 5.)

(b) Where a person injured through the negligence of others has accepted compensation in full satisfaction and discharge of all claims and causes of action against them, his executor cannot, after his death, which resulted from the injuries, maintain an action under Lord Campbell's Act (9 & 10 Vict. c. 93) for the loss sustained by the widow and children of deceased: (*Read v. Great Eastern Railway Company*, 18 L. T. Rep. N. S. 322.)



injury sustained: whilst in the latter instance an action on the case could only be brought: (Arch. Nisi Prius, 299, 436.) The statement of claim would now simply state the facts in either case and claim damages.

Q.—In the case of an injury to a person on the Queen's highway by job horses on a yearly hiring not driven by the job-master's servant, who is liable for it?

A.—The person hiring job horses will be liable, as they are not driven by the job-master's servant, otherwise the job-master would be liable: (see Arch. Nisi Prius, 436, 437; *Brooker v. Floyd*, 13 L. T. Rep. N. S. 803; *Laugher v. Pointer*, 5 B. & C. 547.)

Q.—In what way is a stage-coach proprietor liable to a passenger travelling by his coach, for hurt or injury?

A.—He is liable to an action for damages for any hurt or injury arising from want of skill in the coachman, for any defect in the construction of the coach, or the viciousness of the horses, or for negligence. But if the hurt or injury sustained be the result of unavoidable accident no action lies: (*Aston v. Heaven*, 2 Esp. 533; Chit. Cont. 469, 11th edit.)

Q.—If a traveller by a railway sustain an injury on the journey, will he be entitled to compensation, and against whom should he proceed?

A.—If the injury was occasioned through the negligence of the company's servants, an action may be brought against the company: (see *Palmer v. Grand Junction Railway Company*, 3 Jur. 559, *et infra*.)

Q.—If A. sues for damage arising from the negligent conduct of B., how far may his right to recover be affected by his own want of care?

A.—If A. could, by exercising ordinary care, have avoided the injury, or rather if it can be shown that he, by negligence or want of proper care, contributed to the accident, it will bar his right to recover: (see *Tuff v. Warman*, 27 L. J. N. S. 332; *Witherley v. Regent's Canal Company*, 6 L. T. Rep. N. S. 255) (a)

Q.—What is the meaning of the term "contributory negligence" in actions for negligence, and give an instance in which proof of such negligence will defeat an action?

A.—"Contributory negligence" means that the person injured has by his own negligence contributed to the immediate cause of the accident. As if a person carelessly crosses in front, or gets out, of a train in motion, and is thereby injured, he cannot recover. But in case of damage by collision between vessels through mutual negligence, the total loss is equally divided between them: (see 36 & 37 Vict. c. 66, s. 25, sub-sect. 9.)

Q.—In an action for an injury caused by the bite of a savage dog, what may the defendant put the plaintiff to prove in support of his action?

A.—That the defendant was aware that the animal was savage, and did not take sufficient measures to prevent it doing mischief: (Arch. Nisi Prius, 422; *Gladman v. Johnson*, 15 L. T. Rep. N. S. 476; *Miller v.*

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(a) The following question may be answered from the above: A person is injured whilst travelling on a railway. State a case in which he has a remedy, and when he has none, against the company

*Kimbray*, 16 *ib.* 360.) If, however, the dog bit sheep or cattle, the plaintiff is entitled to recover without such proof: (28 & 29 Vict. c. 60.)

*Q.*—State some of the nuisances affecting dwelling-houses and lands, for which an action will lie.

*A.*—If a man sets up an offensive trade, as a tallow-chandler's, or maintains an offensive thing upon the premises, as a dung-heap, the stench from which renders the air unwholesome, and the enjoyment of property uncomfortable, these are nuisances for which an action will lie. Various other instances may be mentioned, as obstructing lights, or diverting watercourses: (*Arch. Nisi Prius*, 420, *et seq.*)

*Q.*—Will an action lie against a railway company by the owner of a house, none of whose property has been taken by the company, for compensation in respect of injury done to the house by vibration or smoke? What is the leading case on the subject?

*A.*—The use of locomotives is an act expressly authorised, if it be done in the ordinary course of the business of the railway, without negligence, and injury caused thereby will be "*damnum absque injuria*," so that an action will not lie against the company. The leading case on the subject is *Brand and Wife v. Hammersmith and City Railway Company*, L. Rep. 1 Q. B. 130.

*Q.*—What is the nature and character of injury to a reversionary interest in lands or houses which the party entitled to the reversion has a right of action to recover damages in respect of, and what is the nature of the remedy?

*A.*—The injury must be such as to affect the inheritance, as in the case of a tenant for life committing waste by pulling down buildings, or felling timber. The reversioner may maintain an action, and obtain an injunction against the repetition or continuance of the injury.

*Q.*—How should a person proceed for damages against a wilful trespasser, when they would not amount to 5*l.*?

*A.*—Summarily before a justice of the peace, and on conviction the offender may either be imprisoned alone, or imprisoned and kept to hard labour for a term not exceeding two months, or pay a sum not exceeding 5*l.*, and a further sum as compensation for the damage not exceeding 5*l.*; which, in the case of private property, is to be paid to the injured party. Sect. 5 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49) must be read with this answer.

*Q.*—When is a person liable as executor *de son tort*?

*A.*—If a person not appointed executor intermeddle in that character so as to exceed offices merely of kindness and charity, he will make himself executor *de son tort*, liable to others without himself being armed with any legal rights: (*Matt. Exors.* 80, 96, 2nd edit.)

*Q.*—May the owner of a horse which has been taken from him retake it in any and in what place?

*A.*—He may retake it whenever he happens to find it, so that it be not done in a riotous manner, or attended with a breach of the peace, which retaking is termed *recaption*. But if a horse is feloniously stolen, it seems

THE OWNER MAY SELL THEM A SECOND TIME IF FIRST THE GOODS OF ANOTHER  
 TO SELLER IN THE FIRST PLACE. SELLER MAY IN A SECOND TIME SELL THEM OTHERWISE:  
 3 & 4 C. 245. 246.

**Q.**—What is meant by the sale of goods in market overt? Supposing  
 some goods of mine have been stolen from me and the owner will the purchaser  
 recover his goods? Will the owner recover his goods if he has sold them in the goods?

**A.**—The answer to this is that a man who has no property in goods can-  
 not by making a sale transfer the property therein to another. There is  
 no exception to this principle where goods are sold in market overt,  
 which is a sale of goods made in a public market in a particular place by  
 virtue of a charter or prescription. The principle only applies to bona fide  
 sales of goods and not to sales of stolen goods or to gifts or pawns  
 &c. In the City of London market overt is on every day except Sunday.  
 Market overt for goods usually takes place there. Such sale, however, does  
 not bind the Crown: *Case of the 11th ed.* When the owner from  
 whose goods have been stolen has recovered the guilty party to con-  
 viction, he is entitled to a return of the stolen goods: (see 24 & 25 Vict.  
 c. 96, s. 1(1).)

**Q.**—What remedies has the real owner of goods wrongfully sold by  
 an auctioneer to a bona fide purchaser for value?

**A.**—Unless the auctioneer is the agent of the real owner, the purchaser  
 will have no title whatever against him, unless perhaps in some cases  
 where the goods are sold in market overt. But where the auctioneer has  
 been entrusted with the goods for sale, and has acted contrary to his  
 instructions or his authority has been revoked, the remedy of the real  
 owner will be against the auctioneer only: (Add. Tort, 5th ed. 418; and  
 see Factor's Acts, 6 Geo. 4, c. 94; 5 & 6 Vict. c. 39, and 40 & 41 Vict.  
 c. 39).

## THE SUPREME COURT AND ITS JURISDICTION, &c.

**Question.**—What are the divisions of the Supreme Court?

**Answer.**—It is divided into "Her Majesty's High Court of Justice,"  
 which has original jurisdiction and also appellate jurisdiction from inferior  
 courts; and "Her Majesty's Court of Appeal," which has appellate  
 jurisdiction with such original jurisdiction as may be incident to the  
 determination of any appeal: (1873 Act, s. 4.)

**Q.**—Of what is the Court of Appeal composed?

**A.**—Of four *ex officio* judges and five ordinary justices of appeal:  
 (39 & 40 Vict. c. 59, s. 15; 44 & 45 Vict. c. 68, s. 3.) These latter,  
 except Baggallay, L.J., are liable to go circuit, and to be included in  
 commissions of assize.

The *ex officio* judges are the Lord Chancellor (the President), the Lord  
 Chief Justice of England, the Master of the Rolls, and the President of  
 the Probate, Divorce, and Admiralty Division.

The ordinary judges are now styled Lords Justices of Appeal: (40 Vict.  
 c. 9.)

And the Lord Chancellor may request in writing the attendance of an

additional judge from any one or more of the Common Law and Probate Divisions (to be selected by the Division) to attend the sittings of the Court of Appeal : (1875 Act, s. 4).

**Q.**—What jurisdiction vests in the Court of Appeal ?

**A.**—1. All jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in Chancery in the exercise of his and its appellate jurisdiction, and of the same court as a Court of Appeal in Bankruptcy. 2. All jurisdiction and powers of the Court of Appeal in Chancery, of the County Palatine of Lancaster, and all jurisdiction and powers of the Chancellor of the Duchy and County Palatine of Lancaster. 3. All jurisdiction and powers of the Court of the Lord Warden of the Stannaries, assisted by his assessors, including all jurisdiction and powers of the said Lord Warden when sitting in his capacity of judge. 4. All jurisdiction and powers of the Court of Exchequer Chamber. (a) 5. All jurisdiction vested in or capable of being exercised by Her Majesty in Council, or the Judicial Committee of Her Majesty's Privy Council, upon appeal from any judgment or order of the High Court of Admiralty, or from any order in lunacy made by the Lord Chancellor, or any other person having jurisdiction in lunacy : (1873 Act, s. 18.)

**Q.**—Into what five Divisions was the High Court of Justice divided ?

**A.**—1. The Chancery Division, consisting of the Lord Chancellor (President thereof), the Master of the Rolls, and the three Vice-Chancellors, and Mr. Justice Fry : (40 Vict. c. 9.)

2. The Queen's Bench Division, consisting of the Lord Chief Justice of England (President thereof) and the other judges of the Court of Queen's Bench.

3. The Common Pleas Division, consisting of the Lord Chief Justice of that Court (President thereof) and the other judges of that court.

4. The Exchequer Division, consisting of the Lord Chief Baron (President thereof) and the other Barons, but these three Common Law Divisions are now consolidated into the Queen's Bench Division by order of council dated 16th day of December, 1880.

5. The Probate, Divorce, and Admiralty Division, consisting of the Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes, and of the Judge of the High Court of Admiralty : (1873 Act, s. 31.)

**Q.**—What jurisdiction vests in the High Court of Justice ?

**A.**—It includes (1) the High Court of Chancery as a Common Law Court as well as a Court of Equity, including the jurisdiction of the Master of the Rolls as a Judge or Master of the Court of Chancery and any jurisdiction exercised by him in relation to the Court of Chancery as a Common Law Court.

(2) The Court of Queen's Bench.

(3) The Court of Common Pleas at Westminster.

(4) The Court of Exchequer, as a court of revenue as well as a Common Law Court.

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(a) This includes appeals from the Lord Mayor's Court : (*Le Blanche v. Reuter's Telegraph Company*, *Times*, 1st May, 1876.)

- (5) The High Court of Admiralty.
- (6) The Court of Probate.
- (7) The Court for Divorce and Matrimonial Causes.
- (8) The Court of Common Pleas at Lancaster.
- (9) The Court of Pleas at Durham.
- (10) The Courts created by Commissioners of Assize of Oyer and Terminer, and of Gaol Delivery, or any such commissions.

The jurisdiction of this Act transferred to the High Court of Justice includes (subject to the exceptions hereinafter contained) the jurisdiction which at the commencement of this Act was vested in, or capable of being exercised by, all or any one or more of the judges of the said courts respectively sitting in court or chambers or elsewhere when acting as judges or a judge in pursuance of any statute, law, or custom, and all powers given to any such court, or to any such judges or judge, by any statute, and also all ministerial powers, duties, and authorities, incident to any and every part of the jurisdiction as transferred : (1873 Act, s. 16.)

**Q.**—What were the limits of the jurisdiction of Her Majesty's Superior Courts of Common Law at Westminster ?

**A.**—Their jurisdiction was limited to England and Wales and the town of Berwick-upon-Tweed. But it must be remembered that, if the cause of action accrued here, parties might be sued in our courts and served with process abroad. And in transitory actions, if the parties were here, they might be sued here, although the cause of action accrued abroad : (Chit. Arch. 238, 13th edit.) And, further, by the 31 & 32 Vict. c. 54, a register of English judgments is kept at Dublin and Edinburgh, &c. ; by means of certificates of judgments there sent, the courts to which the certificates are sent have the same control over the judgments as regards execution as they have over their own judgments. By the 1873 Act, s. 16, this jurisdiction was transferred to the High Court of Justice.

**Q.**—Is a right to sue accruing in foreign parts taken away by a residence abroad of him to whom it accrues ?

**A.**—If the cause of action accrues abroad, and the plaintiff is also abroad, yet if the defendant is here, and the cause of action is transitory the defendant may be sued here, if the claim be not statute barred. But if the cause of action accrues abroad, and both plaintiff and defendant are abroad, no action lies here : (Pat. & Mac. Pr. 3, 4 ; and see Chit. Cont. 91, 9th edit.)

**Q.**—State what are the usual matters referred by the court to one of the masters. Also state what matters can be disposed of by the Masters at Chambers.

**A.**—They are to examine witnesses before trial when necessary ; to ascertain damages on interlocutory judgments when the amount is substantially a matter of calculation ; causes which involve matters of account which cannot be tried in the ordinary way ; and applications made to the court involving long affidavits. The masters are also empowered to exercise all such authority and jurisdiction as may be exercised by a judge at chambers except in the following :

(a) All matters relating to criminal proceedings or to the liberty of the subject.

(b) Granting leave for service out of the jurisdiction of a writ or notice of a writ of summons.

(c) The removal of actions from one division or judge to another division or judge.

(d) The settlement of issues, except by consent.

(e) Inspection and other orders under Ord. L., rr. 1 to 5.

(f) Appeals from district registrars.

(g) Prohibitions.

(h) Injunctions and other orders under sub-sect. 8 of sect. 25 of the 1873 Act.

(i) Awarding of costs, other than the costs of any proceeding before a master or registrar, except such as he is authorised by the rules or order of court to award.

(k) Reviewing taxation of costs.

(l) Orders absolute for charging stocks, funds, annuities, or share of dividends or annual proceeds thereof.

(m) Acknowledgments of married women: (Ord. LIV., r. 12.)

*Q.*—In what respect does the jurisdiction of a master of this division differ from that of a chief clerk of the Chancery Division on an ordinary summons?

*A.*—A chief clerk represents the judge as his deputy, and his orders are made in the name of a judge, whereas the jurisdiction of a master is distinct, and his orders are made in his own name, and accordingly appeals from district registrars can be heard before a chief clerk, but not before a master. There is also this difference, that in case of dissatisfaction with the decision of the chief clerk, the case may be referred at the request of either party to the judge without any order made, but a master's order must be the subject of regular appeal.

### *Interpleader.*

*Q.*—What is the meaning of an interpleader?

*A.*—It is this: Where two or more persons claim the same thing of a third, wherein he claims no interest, and is ignorant to which of them it belongs, he may apply to the court or judge to compel them to *interplead*, or litigate the right between themselves, without involving him therein: (see Holth. L. D., 2nd edit.)

*Q.*—When may relief by way of interpleader be granted?

*A.*—(1.) Where the person seeking relief (called the applicant) is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or more parties making adverse claims thereto.

(2.) Where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and claim is made to any money, goods, or chattels taken, or intended to be taken, in execution under any process, or to proceeds or value of any

such goods or chattels, by any person other than the person against whom the process issued: (Order LVII., r. 1.) (a)

*Q.*—What evidence is necessary in support of such an application, and when should it be made?

*A.*—The applicant must satisfy the court by affidavit or otherwise:

- (a) That the applicant claims no interest in the subject-matter in dispute, other than for charges or costs.
- (b) That he does not collude with any of the claimants; and
- (c) That he is willing to pay or transfer the subject-matter into court, or to dispose of it as the court or judge may direct. (b)

Where the applicant is a defendant, application for relief may be made at any time after the service of writ of summons: (*Ib.*, rr. 2, 4.)

*Q.*—What is the course of proceeding on such interpleader?

*A.*—The applicant having taken out a summons calling on the claimants to appear and state the nature and particulars of their claims, if either neglects to appear, his claim is barred; if both appear the court or judge may order any claimant to be made defendant in any action already commenced with respect to the subject-matter, in lieu of or in addition to the applicant, or order an issue to be tried, directing at the same time which claimant is to be plaintiff and which defendant: (*Ib.* rr. 5, 7.)

*Q.*—In what cases may the court or judge dispose of the question summarily?

*A.*—(1.) By consent. (2.) On the request of any claimant if, having regard to the value of the subject-matter in dispute, it seems reasonable so to do. (3.) When the question is one of law, and the facts are not in dispute. In this case the opinion of the court may also be ordered to be taken by stating a "special case": (*Ib.*, rr. 8, 9.)

*Q.*—Is judgment in an interpleader issue, or in a summary manner, conclusive?

*A.*—Yes, both against the claimants and all persons claiming under them, unless special leave to appeal be given: (*Ib.*, r. 11.)

*Q.*—Where goods have been seized by a sheriff, and conflicting claims are made, has the court power to order a sale?

*A.*—Where a claimant alleges he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for debt, the court or a judge may order the sale of the whole or a part thereof, and direct the application of the proceeds: (*Ib.*, r. 12.)

*Q.*—If a mortgagor sues for rent after the mortgagee has given the tenant notice of the mortgage, what course should the tenant take to obtain relief from both claims?

*A.*—It has been held that interpleader at law would not lie in such a

(a) Formerly it was necessary that the titles of the claimants should have a common origin; but this is not now a condition of relief: (*Ib.* 2, 3, and 23 & 24 Vict. c. 126, s. 12.)

(b) This affidavit is not usually required from a sheriff, though in strictness he seems bound to produce it.



case (*Murdoch v. Taylor*, 6 Bing. N. S. 293), although it would in equity : (Story's Eq. § 812.) Probably it could now be brought in the High Court in such a case ; if not, the tenant's remedy would be by applying for an order to have the question decided between the plaintiff himself and the mortgagee under Order XVI., r. 48.

### *Affidavits.*

*Q.*—What is an affidavit, and name its several parts ?

*A.*—An affidavit is a *written* statement upon oath, consisting of (1) the title ; (2) the description of the deponent ; (3) the body or contents ; (4) the jurat : (Sm. Act., 88, 2nd edit., by Foulkes.)

*Q.*—Before and after an action brought, how must the affidavit be entitled ?

*A.*—Before action brought it is sufficient to entitle the affidavit with the name of the court or division in which you intend to sue. After action brought the affidavit must be entitled in the cause also, *i.e.*, the Christian and surname of the plaintiff and defendant as well as the court and division : (Sm. Act, 88, 2nd edit., by Foulkes.)

*Q.*—Is an affidavit sworn before one of the judges of the High Court of Judicature at Bengal, admissible in evidence in the High Court of Justice, without any further evidence, and, if any, what further evidence is required ?

*A.*—The authority of the judge to administer oaths and his signature to the jurat must be verified by an affidavit made in this country or by the certificate of a public notary or British consul. This rule applies to all affidavits sworn abroad, unless before the persons specified in the 18 & 19 Vict. c. 42 : (Ohit. Arch. 1301, 13th edit.)

*Q.*—May an affidavit in a cause to be used in court or before a judge be sworn before the solicitor in the cause, or his clerk, each of them being a commissioner authorised to take affidavits in the country ?

*A.*—No affidavit will be deemed sufficient, if sworn before the party's own solicitor or before any agent, correspondent, clerk, or partner of such solicitor : (Order XXXVIII., rr. 16, 17.)

*Q.*—Objection was made to an affidavit that the deponent had not inserted any description of himself or his residence ; was this a good objection ?

*A.*—Yes ; for by Order XXXVIII., r. 8, every affidavit must state the description and true place of abode of the deponent.

*Q.*—What are the requisites to the form of the jurat to an affidavit ?

*A.*—The jurat consists of a short statement when, where, and before whom the affidavit was sworn, and, if several deponents, by whom. And if there be any interlineation, alteration, or erasure, whether in the jurat or in the body, the affidavit cannot be read or made use of without leave, unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, or, in the case of an erasure, unless the words or figures written on the erasure are rewritten



and signed or initialled in the margin by the officer taking it: (*Ib.*, r. 12.)

Q.—What is the form of a jurat when there is more than one deponent?

A.—When several deponents are sworn their names must appear in the jurat, thus: “Severally sworn by the above-named deponents, A., B., and C.,” &c., and if they are all sworn together, “Sworn by both (or all) the above-named deponents,” &c.: (*Ib.*, r. 9.)

Q.—If the jurat omit to state the day on which the affidavit was sworn, what will be the consequence?

A.—The affidavit cannot be read unless by leave: (*Ib.*, rr. 5, 14.)

Q.—Before whom are affidavits sworn in the country?

A.—They are sworn before commissioners appointed to take affidavits in the Supreme Court: (Sm. Act. 2nd edit., by Foulkes, 89.)

Q.—What is required to be sworn in an affidavit of “merits?”

A.—That the defendant has “a good defence to the action upon the merits”: (see fully *Ohit. Arch.* 800, 13th edit.)

Q.—By whom may an affidavit of increase be made?

A.—By the solicitor in the cause, or his managing clerk if he swears that he had the management of the cause.

Q.—Have any, and what, alterations been recently made as to the form of affidavits; and, if the alteration is not adopted, in what way will the costs be affected?

A.—Affidavits to be used in any civil proceedings are now to be drawn up in the first person, divided into paragraphs, to be numbered consecutively, and as nearly as may be confined to a distinct portion of the subject. They must be written or printed bookwise, and confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, when statements as to belief, with the grounds thereof, may be admitted. No costs will be allowed for any affidavit, or part of an affidavit, substantially departing from this rule: (*Ib.*, rr. 3, 7.)

#### *Motions and Rules—Summonses and Orders.*

[NOTE.—Applications are made to the court by motion, and if granted are followed by a rule. Applications at chambers are made by summons followed by an order.]

Q.—Upon service of a rule or order, must the original always be shown?

A.—No; this is not necessary if an office copy be exhibited, unless the service be with a view to an attachment: (Order LXVII., r. 1.)

Q.—When personal service of a rule is not required, will putting it under the door of the defendant's chamber or place of business, or into the letter box, be sufficient? or what is further required to make it good? and where a rule *nisi* is improperly served, can it ever be made absolute?

A.—Putting a rule under the door of the defendant's chambers, &c., will not be sufficient unless there be a notice requiring papers to be so left,

or unless you afterwards call and ascertain that it has been received. If there is any irregularity in the service of a rule *nisi*, the party's appearing and showing cause against it will, in general, be a waiver of the irregularity; and if no sufficient cause be shown, it may be made absolute: (Chit. Arch. 176, 1195, 13th edit.)

**Q.**—Is a party taking out a summons before a judge entitled to an order on the return thereof, or must he take any further step?

**A.**—Such summonses are now entered in a printed list, and are called over in their order. If only one party appears, an order may be made *ex parte* upon an affidavit of service, either granting or dismissing the application, as the case may be, and either with or without costs: (Ord. LIV., r. 5.)

**Q.**—Before what hour must service of pleadings, notices, summonses, orders, rules, and other proceedings be made, to prevent the service being deemed as made on the following day?

**A.**—Before six o'clock p.m.; except on Saturdays, when it must be made before two o'clock p.m. If made after six o'clock p.m., on any day except Saturday, the service will be deemed as made on the following day; and, if made after two o'clock, p.m., on Saturday, the service will be deemed as made on the following Monday: (Order LXIV., r. 11.)

**Q.**—How can the order of a judge or master be enforced; and has any, and what, alteration in the law on this subject been made by the Judicature Acts or the Rules under them?

**A.**—Formerly at common law every order of a judge had to be made a rule of court, after which it was enforced by attachment, or if for payment of money by execution. Now by Order XLII., r. 24, every order of a court or judge is enforced in the same manner as a judgment, and this was the old practice in Chancery.

#### *Attachment.*

**Q.**—What is the nature of a writ of attachment? and when it is issued against the sheriff, to whom is it directed?

**A.**—A writ of attachment is a judicial writ which commands a taking, apprehending, or seizing: (Holt. L. D., 2nd edit.) A party guilty of a contempt of court is punishable by attachment. In ordinary cases the writ is directed to the sheriff; but attachments against the sheriff are directed to the coroner: (see Sm. Act. 183, 2nd edit. by Foulkes.)

**Q.**—Name some of the cases in which the court will grant an attachment.

**A.**—Disobeying a rule of court is a contempt of that particular court and punishable by attachment. An attachment will lie for a libel on the court and also against the sheriff for not returning the writ, or bringing in the body. An attachment also lies against a witness for non-attendance at the trial, if served with a subpoena requiring his attendance: (see *post*, tit. "Execution," and note.)

**Q.**—What service is necessary to enable a party to obtain an attachment?

**A.**—Personal service is necessary as a general rule, and the original

rule should be shown. There are, however, circumstances which are deemed equivalent to personal service: as, if the party admits the rule to be then in his possession, or shows cause against it; or where he prevents an actual personal service by violence: (see *Ohit. Arch.* 1391, 13th edit.)

*Q.*—How do the courts proceed in cases of contempt?

*A.*—They punish the party guilty of it by attachment: (*Sm. Act.* 184, 2nd edit., by Foulkes.)

*Q.*—In what cases are rules for attachment absolute in the first instance?

*A.*—In all cases now by Order LII., r. 2.

## FORMS OF ACTION, &c., AND PRELIMINARIES TO THE COMMENCEMENT OF AN ACTION. (a)

*Question.*—What is an action?

*Answer.*—The means pointed out by law of obtaining the remedy of a civil injury. It is defined also as that formal course of proceeding which a party seeking to enforce a right is by law bound to adopt: (*Sm. Act.* 1, 2nd edit., by Foulkes.)

*Q.*—What were the principal causes of action at common law?

*A.*—They were the following: 1. Detention of debt. 2. For trespass, which might be either to a man's person, or his goods or lands. 3. For libel or slander. 4. For a conversion of goods. 5. For use and occupation. 6. For fraudulent misrepresentation. 7. For false imprisonment. 8. For a private nuisance, or a public one from which a person has sustained a particular injury. 9. For an excessive or wrongful distress.

*Q.*—What was the meaning of a *local* and of a *transitory* action? and what actions were local and what transitory?

*A.*—*Local actions* were founded on such causes of action as necessarily referred to some particular locality, as in the case of trespass to land; while *transitory actions* were founded on such causes of action as might be supposed to take place anywhere, as in the case of trespass to goods. Real actions were always in their nature local; personal actions were, for the most part, transitory. And local actions were (unless otherwise specially ordered) tried in the county in which the cause of action arose, and by a jury of that county; while transitory actions were tried in any county, at the discretion (in general) of the plaintiff: (see 3 *St. C.* 374, 8th edit.) By Order XXXVI., r. 1, there is now no local *venue* for the trial of any action. Actions will in future be tried in Middlesex unless plaintiff name in his statement of claim, or where there is no statement of claim, by notice within six days after appearance, some other county or place, or a judge otherwise order.

(a) The names of the old forms are still used to describe the nature of actions.

Q.—State the maxim of law that applies to transitory actions.

A.—The maxim applying to transitory actions is *Debitum et contractus sunt nullius loci*: (*Bulwer's case*, 7 Rep. 3, a; *Mostyn v. Fabrigas*, 1 Sm. L. O. 652.)(a)

Q.—In adjudicating on causes of action which have risen abroad, by what laws and practice are the courts of this country governed?

A.—If the cause of action be transitory, an action thereon may be brought here, the merits being determinable according to the law of the country where the cause of action arose, or the law of the country with reference to which the contract was made. The practice, however, being governed by our laws. (a) Where, however, the venue was local, no action could be maintained in the Superior Courts here, if the *locus in quo* was abroad; as for breaking a close in Canada (see *Lush's Pr.* 1, 3rd edit.); but it would be otherwise now: (see *Whitaker v. Forbes*, 45 L. J. 140.)

Q.—What is the distinction between liquidated and unliquidated damages? Give instances of actions in which each species of damages is recoverable.

A.—Liquidated damages is where the amount to be recovered is fixed and certain, as in an action for debt. Unliquidated, where the amount to be recovered is uncertain, as where an action is brought for an assault. Again, in an action for liquidated damages, judgment by default is final; but, for unliquidated damages, it is only interlocutory, and the amount must be assessed either on a writ of inquiry or before a master of the court (3 St. O. ch. 5), or ascertained in any other way which the court or judge may direct: (see Order XIII., r. 5.)

Q.—Explain the difference between penalties and liquidated damages.

A.—As to liquidated damages, see preceding answer. The legal operation of a penalty is not to cause a forfeiture of the whole amount, but only enough to satisfy the actual damage sustained.

Q.—What was an action of assumpsit?

A.—It was an action which laid for the recovery of damages for the breach of any simple contract. It laid on bills of exchange, on promissory notes, on policies of insurance, on loans, sales, guarantees; in fact, in almost all the cases which are of most frequent practical occurrence: (Sm. Act. 47, 10 edit.; 3 St. C. 372, 8th edit.)

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(a) It is a general rule, although not universally true, that a contract made abroad, if good according to the *lex loci contractus*, would be good in England: (*The Sussex Peerage case*, 1 Cl. & Fin. 85.) Immoral contracts, though valid abroad, would not be enforced here: (Story's Confl. Laws, ss. 258, 259.) If the law of this country conflicts with foreign law there is no comity of nations which requires our law to give way: (*ib.* s. 326.) In *Mostyn v. Fabrigas*, it was held that trespass and false imprisonment lay in England by a native Minorquin against the governor of Minorca, for such injury committed by him in Minorca: (1 Sm. L. O. 652 and notes.) This is the leading case as to torts. See also *Scott v. Lord Seymour* (6 L. T. Rep N. S. 607.) If a charter party does not provide otherwise, the law of the country to which the ship belongs governs the contract, as a general rule: (*Lloyd v. Guibert*, L. Rep. 1 Q. B. 115.)

Q.—What was an action of covenant?

A.—Covenant laid where redress in damages was sought for the breach of a covenant, that is, of an agreement by *deed*. There are now no special forms of actions, but actions on deeds will still be called actions of covenant, and similarly in the case of trover, &c. : (Sm. Act. 2nd edit., by Foulkes, 30.)

Q.—What were the principal actions at common law arising upon contract, their respective incidents and comparative advantages? (a)

A.—The actions of assumpsit, debt, and covenant, arise upon contract, and were transitory actions. (b) Assumpsit might be brought for the breach of any simple contract, but debt was of limited application, and laid only where there was a privity of contract between the parties; and covenant could only be maintained where the contract was under seal. On the other hand, debt laid on matters of record, and on contracts under seal as well as on simple contracts, if the amount was liquidated, whereas assumpsit could only be brought on simple contracts. Again, a judgment by default in an action of debt was final; but in assumpsit and covenant it might be interlocutory : (3 St. C. ch. 7, 8.)

Q.—What are the essentials of a simple contract for the breach of which an action can be maintained?

A.—There must be (1) the mutual assent of two or more persons able to contract; (2) a valuable consideration, which must not be illegal or immoral; (3) something to be done or omitted, which is the subject of the contract; and if this subject is within the 4th or 17th sections of the Statute of Frauds or within any other statutes, their requirements must be complied with : (2 St. C. 54, &c. 8th edit.; Chit. Cont., 8, 11th edit.)

Q.—State what common law remedy is open to a mortgagee to obtain repayment of the money advanced by him on the security of the mortgage.

A.—After default he may sue on his bond or covenant, if one, and proceed to eject the mortgagor, and any of his tenants who became such after the mortgage (*Keech v. Hall*, 1 Sm. L. C. 574); and he could now do this in the Common Law Divisions of the High Court of Justice. He may also give tenants, who were such prior to the mortgage, notice to pay rent to him, and distrain for the same : (*Moss v. Gallimore*, 1 Sm. L. C. 627.)

Q.—A. lends B. 20*l.* to be paid on a certain day; B., after the day is past, enters into a contract with A. under seal to pay the amount. Can A. sue B. for money lent?

A.—A. cannot sue B. for money lent, as the deed operates as an extinguishment of the simple contract, being a security of a higher nature. A. must, therefore, sue B. on the deed : (see Chit. Cont. 7, 11th edit.; Arch. Nisi Prius, 83, &c.)

(a) The following questions may be answered from the above: What was the difference between an action of assumpsit and debt? State what actions at common law were founded upon contract, adding whether they were local or transitory.

(b) The actions of account and annuity were also founded on contract.

**Q.**—What was an action in trover ?

**A.**—It was a species of trespass on the case, and laid for the recovery of damages against a person who had found or obtained another's goods, and wrongfully converted them to his own use, from which finding and converting it derived its name : (Sm. Act. 30, 2nd edit. by Foulkes.)

**Q.**—What amounts to such a wrongful interference with the goods of another as would amount to a conversion in respect of which an action in the nature of trover would lie ?

**A.**—The conversion or interference must be an asportation or disposal of a chattel for the use of the defendant or some other person, or an assertion of right to the dominion over it by the defendant, and a refusal to deliver it up at all, or except on conditions which the defendant has no right to impose, or a wilful destruction of it, or a detaining it, so as to deprive the owner of the dominion over it : (see Smith's Manual of Common Law, sect. 1317.)

**Q.**—What was an action of detinue, and what alteration in the law as to the result of an action of detinue was made by the Common Law Procedure Act, 1854 ?

**A.**—Detinue laid to recover goods and chattels, or deeds and documents unlawfully detained : (Sm. *sup.*) By the Procedure Act, 1854, by leave of judge, execution might issue for the return of the chattel detained, without giving the defendant the option of paying its value (see sect. 78 ; also 19 & 20 Vict. c. 97) ; but under the Procedure Act, 1860, the court or a judge might give the defendant leave to pay money into court to the value of the goods : (see sect. 25.) The plaintiff might have the assessed value at his option without leave : (17 & 18 Vict. c. 125, s. 78.)

**Q.**—What was the material difference between trover and detinue respectively ?

**A.**—In trover only the value of the chattel was recoverable ; in detinue the judgment was for the chattel or its value : (3 St. O. 442, 443, 8th edit., *et supra.*)

**Q.**—Was there any, and what, proceeding at common law under which the plaintiff could recover a specific chattel ?

**A.**—Yes, detinue might be brought ; and by the 19 & 20 Vict. c. 97, if there was a contract to deliver specific goods for a price, the jury might, by leave of the judge at the trial, find what the goods were, what the plaintiff had to pay for the same, and by the leave of the court or judge execution might issue for the goods on payment of the price.

**Q.**—Can an action be supported on a lost bond or deed where the loss can be accounted for, and the once existence of the original proved ?

**A.**—As *profert* and *oyer* are no longer necessary, such an action may now be maintained : (see 15 & 16 Vict. c. 76, s. 55.)

**Q.**—Is a civil action maintainable in any case in which the cause of action constitutes an indictable offence ?

**A.**—Not as a general rule, if such offence amounts to a felony. The civil remedy is, however, only suspended ; for, after the injured party has done his duty to society by bringing the offender to justice, he may

maintain an action for the same cause as that on which the criminal prosecution was founded : (see Broom's Com. 100, 101, and note *a*, 3rd edit.)

The rule appears to be, as laid down by Lord Justice Baggallay, cited by Mr. Justice Williams in *Midland Counties Insurance Company v. Smith* (50 L. J. 329, Q. B.)—"the policy of the law will not allow the person injured to seek civil redress if he has failed in his duty of bringing or endeavouring to bring the felon to justice."

The cases of assault and libel are exceptions to the above rule, being only misdemeanours (*ib.*); also actions under 9 & 10 Vict. c. 93 (commonly called Lord Campbell's Act), for compensation in the case of a personal injury resulting in death; and forging trade marks, &c. (25 & 26 Vict. c. 88, s. 2); also actions under 22 & 23 Vict. c. 35, s. 24, against sellers, mortgagors, solicitors, or agents for concealing title or falsifying a pedigree.

Q.—How can the recovery of possession of a house be effected?

A.—By action in the High Court of Justice. There is also a summary remedy in the County Courts, and before a magistrate, in certain cases between landlord and tenant upon the ending of the term or interest of the tenant: (3 St. C. ch. 8.)

Q.—In the case of seduction who is the proper party to bring the action, and for what is the action brought?

A.—The action may be brought by the *employer*; it cannot be maintained by the parents of the seduced, as such, nor by the daughter herself (for *Volenti non fit injuria*); but a father may sue in the character of employer, if the daughter were living at home at the time of the injury committed, and in his service. The action is usually brought for loss of service (*per quod servitium amisit*): (3 St. C. 456, 8th edit.; Arch. Nisi Prius, 304.)

Q.—How was a contract by matter of record enforced?

A.—Either by an action of debt, or by *scire facias*, or writ of revivor: (see 3 St. C. 372, 594, 595, 8th edit.)

Q.—How were contracts under seal enforced?

A.—Either by an action of covenant or debt. Covenant would lie in every case of an agreement under seal, and where the damages were unliquidated it was the only remedy. As for a breach of a covenant in a lease on the part of the tenant to repair, see St. C. 447, 8th edit.

Q.—Mention some of the causes of action which do not survive to executors.

A.—Notwithstanding several statutory exceptions (see *ante*, p. 52), the maxim, *Actio personalis moritur cum personâ* still applies where a tort is committed to a man's person, feelings, or reputation, as for assault, libel, slander, or seduction of his daughter, or breach of promise; in such cases no action lies at the suit of the executors, or administrators: (Bro. Max. 702, 708, 2nd edit.)

Q.—What were the forms of action founded on tort? and state what was the gist of each action.



A.—They were the following : 1. Trespass. 2. Case. 3. Trover. 4. Detinue. 5. Replevin. 6. Ejectment.

The gist (or foundation, see Holth. L. D. 2nd edit.) of the action of trespass was the immediate violence with which the injury was accompanied ; case, the consequential injury resulting from the tort ; trover, the wrongful conversion of goods and chattels ; detinue, the wrongful detention ; replevin, the illegal taking and detaining of goods and chattels ; and the gist of ejectment was the improper withholding of land : (see 3 St. C. 372, *et seq.*, 8th edit.)

Q.—What was the distinction between actions of contract and of tort ?

A.—Actions of contract arose out of the responsibility which resulted from the breach of a voluntary engagement of one individual with another ; whilst actions of tort arose from liabilities which originated in wrongs unconnected with contract, and were either an infringement of a legal *right*, or the violation of a legal duty : (Broo. Com. 642, 3rd edit. ; Chit. Cont. 1, 11th edit.)

Q.—A., B., and C. are sued together on a joint promissory note ; they are also sued for breaking and entering a close, and judgment is recovered ; but execution is levied against A. alone in each action. Has A. a right to compel contribution from his co-defendants in either action ?

A.—Yes, in the action upon a promissory note, for the law allows contribution between defendants *ex contractu*. But as to the action of trespass, A. will be unable to compel B. and C. to contribute, unless A. was not aware that the trespass was illegal, or if its nature was doubtful ; for as a general rule, there is no contribution between wrongdoers : (see *Merryweather v. Nixan*, 2 Sm. L. C. 546 ; and notes to *Lampleigh v. Braithwaite*, 1 Sm. L. C. 151.)

Q.—What is the meaning of a set-off ? and mention instances in which debts or demands may and may not be set off against each other. (a)

A.—A set-off is a demand which the defendant in an action sets up against the plaintiff's demand, so as to counterbalance that of the plaintiff, either altogether or in part : (Holth. L. D. 2nd edit.)

The plaintiff's claim and the subject of the set-off must still be mutual debts : (*Newell v. Provincial Bank of England*, 34 L. T. Rep. N. S. 533.)

Formerly it could not be a claim merely sounding in damages, and must have been a legal and not a mere equitable debt, and due and payable at the commencement of the action. It must not be statute-barred : (see 2 Geo. 2, c. 22 ; 8 Geo. 2, c. 24 ; Arch. Nisi Prius, 122-124.) By Order XIX., r. 3, the defendant may now set off any right or claim whether it sound in damages or not, and by the 1873 Act, s. 24, subsect. 3, any equitable estate or right (in addition to any legal) may be set up by a defendant by way of counter-claim, and by Order XXI., r. 17, the defendant may take judgment for any balance due to him, or such relief as he may be entitled to on the merits of the case.

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(a) Also put thus : Can a set-off be pleaded to a special count for unliquidated damages ? Give the reason for your answer.



Q.—Is it compulsory on a defendant to set off his claim against the plaintiff's demand in an action brought by the plaintiff? or can he bring his action for the amount of his set-off?

A.—It is not compulsory on the defendant to set off his claim against the plaintiff's, but it is generally advisable for him to do so, especially under the new procedure. He may, however, bring his action for the amount of his set-off: (*Baskwell v. Browne*, 2 Burr. 1229.)

Q.—Jones and Wilkinson bring an action against Bennett to recover 100*l.* due from him to them jointly. Wilkinson alone owes Bennett 50*l.* Can Bennett set-off this 50*l.* in the action against him? and if not, why not?

A.—Bennett cannot do so because the debts are not mutual, which is one of the essentials necessary to set off one debt against another: (see Arch. Nisi Prius, 124.) But a defendant is not precluded from the benefit of a set-off because there is a misjoinder of plaintiffs in the action: (23 & 24 Vict. c. 126, s. 20.) It is submitted that under the 1873 Act, s. 24, sub-sect. 3, the defendant might now obtain relief against Wilkinson in such action if properly claimed in his defence.

Q.—Where the defendant pleads a set-off, and proves more than the plaintiff's claim, can the defendant obtain the benefit of such overplus, and how?

A.—Formerly he could not without a fresh action (*Hennell v. Fairlamb*, 3 Esp. 104): but he can now, under Order XXL, r. 17, have judgment for the balance due.

Q.—If too many plaintiffs are joined in an action, can the defendant have the benefit of a set-off against all, or any, and which of them, separately?

A.—A defendant having pleaded a set-off in such a case is entitled to the benefit thereof, against all the plaintiffs originally joined; or all the plaintiffs entitled to recover: (23 & 24 Vict. c. 126, s. 20; and see *supra*.)

#### *Limitations of Actions.*

Q.—Within what time must an action of debt on simple contract, or on a specialty, be brought, except in cases of disability?

A.—An action to recover a simple contract debt must be brought within six years from the time the cause of action accrued, and to recover a debt on specialty within twenty years from the accruing of the cause of action; saving in all cases the right of persons under disability, as infants, *feme covert*s, persons *non compos mentis*; and, as to the debtor being beyond the seas, see 21 Jac. 1, c. 16; 3 & 4 Will. 4, c. 42; 19 & 20 Vict. c. 97.

Q.—In what cases of disability may actions be brought after the disability ceases?

A.—The cases of disability have been already mentioned; a party under any of those disabilities is at liberty to bring his action within the same period after the removal of the disability as is allowed to persons having no such impediment: (4 Anne, c. 16, s. 19; 3 & 4 Will. 4, c. 42, s. 3; 3 St. C. 491 *et seq.*, 8th edit.)

Q.—Is a party assaulted limited to any particular time within which he can sue for the assault? What difference is there between false imprisonment and slander in this respect?

A.—Actions for assault must be brought within four years after the right to do so accrued. Actions for slander must be brought within two years, but for false imprisonment four years are allowed: (21 Jac. 1, c. 16; 3 St. O. 491, 8th edit.)

Q.—State the periods within which an action can be brought in the case of libel or detinue.

A.—Within six years after the cause of action accrues or disability ceases: (21 Jac. 1, c. 16.)

Q.—Does the Statute of Limitations apply where a debtor was abroad when the cause of action accrued, and who has returned to this country; and if not, within what time may the action be commenced?

A.—Where a debtor is abroad at the time the cause of action accrues, the creditor has six years after the debtor's return to bring his action by virtue of the stat. 4 Anne, c. 16, s. 19. This section is not affected by sect. 10 of the 19 & 20 Vict. c. 97. As to *where* is deemed beyond seas, see sect. 12 of the last-mentioned Act.

Q.—When a party is beyond seas at the time when a cause of action accrues to him, is he entitled to any and what further time for commencing his action beyond the period prescribed by the Statute of Limitations?

A.—He is not entitled to any further time for commencing his action beyond the period allowed by the Statute of Limitations (19 & 20 Vict. c. 97, s. 10), as he was formerly: (Sm. Act. 50, n. 10th edit.) But this section does not apply if the *debtor* is beyond seas when the cause of action accrues: (see *supra*.)

Q.—In respect of a lease under seal, how long does the liability of the lessee last, and within what time may an action of covenant be brought?

A.—The liability of a lessee under a lease by deed lasts as long as the lease itself. An action on the covenant may be brought within twenty years after the accruing of the cause of action (3 & 4 Will. 4, c. 42, s. 3); an action to recover land or rent must now be brought within twelve years: (see 37 & 38 Vict. c. 57.)

Q.—Where there are several parties who are entitled jointly to sue in an action of contract, and one of them is abroad, does the statute run against the others?

A.—Yes, as an action might be brought, in their joint names, by the parties residing here: (*Perry v. Jackson*, 4 T. R. 516.) And if one of several joint contractors is abroad, the statute now runs against those residing here; but a judgment obtained against those here cannot be pleaded in bar to proceedings against those abroad when they return: (sect. 11, 19 & 20 Vict. c. 97.)

Q.—Suppose a debt to be incurred by a party resident in this country, and some months after the debtor leave the country and reside abroad, when would the Statute of Limitations begin to run?

A.—At the time of contracting the debt (Arch. Nisi Prius, 130); and as it is a rule that when it has once begun to run nothing (except as stated *infra*) can stop its operation, the subsequent departure of the debtor from this country will not prevent the statute running against the debt: (*Smith v. Hill*, 1 Wils. 134.)

Q.—Is the Statute of Limitations a good answer to an action on a bill of exchange more than six years old, on which bill the interest has been paid within six years?

A.—It is not, as the payment of interest prevents the statute running: (Arch. Nisi Prius, 137.)

Q.—From what date does the Statute of Limitations run to bar the recovery of interest upon a promissory note payable on demand, the sum secured by the note having been paid?

A.—From payment of the principal: (see Chit. Cont. 11th edit., p. 749 *et seq.*)

Q.—Should the period within which an action on a simple contract debt can be brought have expired, and the defendant plead the Statute of Limitations, will a verbal promise given within the limited time be sufficient to enable the plaintiff to recover, or must he be prepared with any and what further evidence?

A.—It will not entitle the plaintiff to recover; he must be prepared with a promise or acknowledgment in *writing* signed by the party to be charged therewith, or his duly authorised agent: (9 Geo. 4, c. 14, s. 1; 19 & 20 Vict. c. 97, s. 13.)

Q.—In an action against two or more joint contractors to recover a debt which is statute-barred, evidence can be given of an acknowledgment by one of them; will this revive the debt against the other joint contractor or contractors?

A.—No; the 9 Geo. 4, c. 14, enacting that where there are two or more joint contractors, &c., no joint contractors, &c., shall lose the benefit of the enactments of the Statute of Limitations, by reason only of the written acknowledgment of the other. Nor will part payment by one contractor, &c., revive a statute-barred debt against the others since the 19 & 20 Vict. c. 97, s. 14. (a)

Q.—What is necessary to prevent the Statute of Limitations running against a debt, especially when the debtor cannot be found?

A.—A written acknowledgment signed by the party liable, or his agent, or a payment either of principal or interest, will prevent the statute running: (9 Geo. 4, c. 14; 19 & 20 Vict. c. 97.) The acknowledgment must be such that a promise to pay may be implied from it (b): (Arch. Nisi Prius, 133-137.)

If the defendant cannot be found, the effect of the statute may be barred by suing out a writ of summons, and getting it renewed within a

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(a) This section extends to a part payment by one of several drawers liable on a joint and several promissory note: (*Cockrell v. Smart*, 7 L. T. Rep. N. S. 752.)

(b) Also asked thus: What is a sufficient acknowledgment of a debt to take a case out of the Statute of Limitations?

year, and afterwards within successive periods of six months, as directed by Order VIII.(a)

*Q.*—When a person has a lien on goods as a security for a debt, and such debt becomes barred by the Statute of Limitations, does the lien continue or is it determined?

*A.*—The lien will continue, for the Statute of Limitations governing *personal* actions merely bars the remedy of action, and does not extinguish the *right* to the debt; as do those governing real actions: (3 St. C. 491, 8th edit.)

*Q.*—If a creditor has two distinct debts owing to him from the same debtor, one of which is statute-barred, under what circumstances, if any, may he apply money paid by such debtor in satisfaction of the debt so barred?

*A.*—In the absence of any appropriation by the debtor at the time of making the payment, the creditor may apply it in satisfaction of the statute-barred debt: (Chit. Cont. 689, 11th edit.)

#### *Notice before Action.*

*Q.*—Is it necessary, in any and what cases, previously to the commencement of an action, to give notice to the opposite party, in order to complete the cause of action? If any notice be necessary, state what notice is sufficient and the consequences of the plaintiff failing, upon the trial, to prove the service of a notice.

*A.*—In actions against justices of the peace for anything done by them in the execution of their duty, notice must be given: so in actions against commissioners of bankruptcy, &c., officers of the army, navy, marines, customs, or excise, or against any person acting under the direction of the Commissioners of Her Majesty's Customs for anything done in the execution of their office, &c., &c. Notices must be given one calendar month before the commencement of the action. If the plaintiff fail to prove the notice he cannot recover: (see Sm. Act. 44, 2nd edit., by Foulkes.)

*Q.*—What should be done before commencing an action in the nature of trover?

*A.*—Where the defendant is in possession of the goods claimed, and there is no evidence of an actual conversion, a demand of the goods should be made; and if the defendant refuse to deliver them up, this will be evidence of a conversion so as to support the action: (Arch. Nisi Prius, 457, 458.)

*Q.*—In an action against a constable who has acted under a warrant of a justice, what demand must be made?

*A.*—Demand *in writing* of the perusal and copy of the warrant, signed by the plaintiff or his solicitor, must be made or left at his usual place of abode; and if not granted within six days, the plaintiff may commence

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(a) Also asked thus: When a writ is issued against a party who cannot be served, what steps should be taken to prevent the Statute of Limitations barring the right of action?

his action against the constable alone ; but, if granted, he must join the justice as a co-defendant, and then the mere production of the warrant at the trial will entitle the constable to a verdict, though, if the justice had no jurisdiction, the plaintiff will recover against him : (Sm. Act. 45, 2nd edit., by Foulkes.)

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### PROCEEDINGS BY ACTION TO TRIAL, &c.

*Question.*—What is the form of the commencement of an action ?

*Answer.*—Every action in the High Court is now commenced by writ of summons : (Ord. II., r. 1.)

*Q.*—What is the first step a solicitor should take when applied to to commence an action ?

*A.*—To address a letter to the person intended to be sued, stating the claim for which instructions have been received to sue him, unless there is cause to believe the party to be sued would, if he had notice of the intended action, keep out of the way. But the first step in the action itself, is suing out of a writ of summons, or obtaining leave to issue it where necessary.

*Q.*—How must writs of summons be indorsed ?

*A.*—1. With a statement of the nature of the claim made, or of the relief or remedy required, in the action : (Ord. II., r. 1.)

2. With the representative capacity, if any, of the plaintiff or the defendant, or any of the defendants, in respect of which he sues or is sued : (Ord. III., r. 4.)

3. Or it may be specially indorsed in case of debt of liquidated demands, &c. : (*Ib.*, r. 6.)

4. And where for a debt or liquidated demand only, it must state the amount claimed for debt, or in respect of such demand, and for costs respectively ; and state that upon payment thereof within four days after service, or in case of a writ for service out of jurisdiction, within the time allowed for appearance, further proceedings will be stayed : (*Ib.*, r. 7.)

5. With claim for an account where one is required : (*Ib.*, r. 8.)

6. And where the writ is issued from a London office, with the address of the plaintiff, and of his solicitor's name and place of business, with, if more than three miles from the principal entrance of the Central Hall of the Royal Courts of Justice, another proper place, called his address for service within that distance ; and, if only agent. the name and place of business of the principal solicitor : (Ord. IV., r. 1.)

7. And if the plaintiff sues in person, his residence and occupation, and an address for service within three miles of the principal entrance of the said Central Hall : (*Ib.*, r. 2.)

8. If issued in the district registry in the above cases, and the place of business or residence is not within the district, then an address for service within the district must be added ; and if the defendant does not reside within the district, a further address for service within three miles of the principal entrance of the said Central Hall : (*Ib.*, r. 3.)

**Q.**—What is the effect of omitting any of the requisite indorsements ?

**A.**—This does not render the writ absolutely void, but enables the defendant to have it set aside for irregularity, or amended on terms, on application to the court or to a judge at chambers: (Ord. LXX., rr. 1 and 2.)

**Q.**—In a writ of summons would it be a sufficient description if the defendant were described as “A. B. of the City of London;” and what description is required by the statute ?

**A.**—The above description would not be sufficient; for the Procedure Act, 1852, required the “place and county” of the residence or supposed residence of the defendant to be mentioned in the writ and copy served: (15 & 16 Vict. c. 76, s. 2.) And here the place is not given (*Cotton v. Sawyer*, 10 M. & W. 328); and the new form of writ in Appendix A. to Order II. follows the old form in this respect.

**Q.**—When an action is brought against several persons for the same cause of action, should you insert all the names in one writ, or is there any number of names to which you are limited ?

**A.**—The writ of summons may contain the names of all the defendants liable for the same cause of action: (see Sm. Act. 59, 10th edit. Order XVI., r. 4.) There is no limit to the number of defendants jointly liable.

**Q.**—If the names of several defendants have been inserted in the same writ, can you afterwards proceed against any or either of them separately, for any different cause of action ?

**A.**—If you have another cause of action against any of them, you may proceed against him or them separately: (see Chit. Arch. 207, 13th edit.)

**Q.**—Several defendants are partners in trade: is it necessary to serve each personally with a copy of the writ of summons to compel an appearance, or will service on one for himself and his partners, the other defendants, be good ?

**A.**—Formerly all the partners, defendants, must have been served personally; but now, where partners are sued in the name of the firm, service upon any one of them, or at their principal place of business upon the manager, is sufficient: (Ord. IX., r. 6.)

**Q.**—Action against husband and wife, what service of the writ will suffice ?

**A.**—When husband and wife are both defendants to the action, they shall both be served, unless the court or a judge shall otherwise order: (Order IX., r. 3.)

**Q.**—Was it ever necessary, and is it now necessary, in a writ of summons to mention the particular cause of action in respect of which the suit is brought ?

**A.**—Before the Procedure Act, 1852, it was necessary to do so; now the nature of the claim made, or of the relief or remedy required, must be indorsed: (Ord. II., r. 1.)

Q.—On what day must a writ of summons be dated, and in whose name must it be tested?

A.—It must be dated on the day it is issued, and tested in the name of the Lord Chancellor, or in case of vacancy of such office, then in the name of the Lord Chief Justice of England: (Ord. II., r. 8.)

Q.—How long does a writ of summons remain in force, and how may it be continued if the defendant cannot be served within the prescribed time, and on what days and at what hours can it be served?

A.—It remains in force for twelve months from its date, including the day of such date; but if the defendant has not been served the original or concurrent writ may be ordered to be renewed by any judge or district registrar, for six months from the date of such renewal, if satisfied that reasonable efforts have been made to effect service, or for other good reason. Writs issued under the old practice can be renewed without order (No. VII., Bitt. Pract. Cas.) at any time before its expiration, for six months from the date of such renewal, and so from time to time during the currency of the renewed writ, by being re-sealed. The writ may be served at any hour of the day or night, and on any day, except Sunday, so long as it remains in force: (Steph. Lush. Pr. 256.)

Q.—Where several defendants live in different counties, can they all be served with one writ of summons?

A.—Yes; but as each defendant is entitled to see the original writ at the time of service, duplicate originals, or *concurrent writs*, as they are called, may be issued at any time during the currency of the original writ, and they remain in force during the period the original writ is in force (Ord. VI.); and a writ for service within the jurisdiction may be marked as a concurrent writ with one for service out, and *vice versa*.

Q.—If there be two defendants, must each defendant be served with the writ of summons before the plaintiff can take any further step?

A.—When practicable, each defendant must be served before the plaintiff proceeds (except partners, see *ante*, p. 75.) If this cannot be done, and the served defendant appears, and the action arises *ex contractu*, (a) and the writ is specially indorsed, the plaintiff should obtain an order for substituted or other service, as stated *infra*, against the other defendant, sign judgment, and issue execution, and proceed if necessary against the appearing defendant. If the served defendant does not appear, judgment may be signed, but an order to amend the writ by striking out the other defendant should be obtained: (see Chit. Arch. 248, 13th edit.)

Q.—What steps should be taken on behalf of a plaintiff who is unable to effect personal service of writ of a summons?

A.—An application should be made at chambers supported by affidavit, and if the judge is satisfied that *prompt* personal service cannot be

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(a) We say *ex contractu*, because, if the action arose *ex delicto*, the plaintiff may abandon his suit against the defendant who cannot be served, and proceed against the other alone, and the non-joinder cannot be taken advantage of: (Sm. Act. 151, 10th edit.) And even when the action arises out of contract, if one of the joint contractors is abroad, the one here may be sued alone: (19 & 20 Vict. c. 97, s. 11.)



effected, he may order substituted service or notice in lieu thereof : (Ord. IX., r. 2.)

Q.—If you cannot serve a defendant with a writ, state what should be done under the Judicature Act to obtain an order for substituted service. (a)

A.—If it appear that the plaintiff is unable to effect prompt personal service, the court or judge may make such order for substituted or other service, or for the substitution for service of notice by advertisement or otherwise, as may seem just : (Ord. IX., r. 2.)

Q.—Within what time after service of a writ of summons is it necessary to indorse on such writ the day of the week and month of such service ?

A.—Within three days after service of the writ, otherwise the plaintiff would not be at liberty, in case of non-appearance, to proceed by default, but the time may be extended ; and every affidavit of service of such writ must mention the day on which such indorsement was made : (Ord. IX., r. 15.)

The rule applies to substituted as well as other service.

Q.—If such indorsement be omitted, what is the consequence to the plaintiff ?

A.—He cannot proceed under the provisions of the Orders in case of non-appearance to sign judgment and issue execution : (*Ib.*)

Q.—In what cases may a special indorsement be made on a writ of summons of the particulars of the plaintiff's claim, and what is the consequence of an omission to make such indorsement, should the defendant not appear, having been served with the writ ?

A.—The writ may be specially indorsed in all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising upon a contract express or implied, as, for instance, on a bill of exchange, promissory note, cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt other than a penalty, or on a guaranty, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand only, or on a trust, or in actions for the recovery of land, with or without a claim for rent, or mesne profits by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or against persons claiming under such tenant : (Ord. III., r. 6.)

When it is omitted to be indorsed, the plaintiff may file a proper affidavit of service and a statement of claim, and may proceed as if such party had appeared, and in default of any defence may enter judgment at the expiration of ten days for the amount with costs : (Ord. XIII., r. 12 ; and Ord. XXVII., r. 2.)

Q.—In an action in the Superior Court to recover the amount of an undisputed account, what course would you advise on the part of the

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(a) Also asked thus: If the defendant cannot be found or served with the writ of summons, what steps must be adopted to enable the plaintiff to proceed ?



plaintiff so as to save expense, and what if the action were brought in the County Court ?

A.—The plaintiff should issue a writ specially indorsed under Ord. III., r. 6. Judgment can then be signed after eight days in default of appearance ; and when an appearance is entered, proceedings can be taken under Ord. XIV., r. 1, that the defendant should show cause why judgment should not be entered. In the County Court the plaintiff should issue a default summons. The defendant must then, within sixteen days, give notice of his intention to defend ; in default of which the plaintiff may have judgment entered up for the amount of his claim and costs ; but if defendant gives notice, plaintiff must go on with his action : (38 & 39 Vict. c. 50, s. 1.)

Q.—A writ is indorsed “the plaintiff’s claim is 100*l.* for the price of goods sold.” Defendant appears, but has no defence. Can the plaintiff successfully apply for summary judgment, or must he take any and what steps before doing so ?

A.—This does not constitute a special indorsement under Ord. III., r. 6, and therefore no application for summary judgment can be made under Ord. XIV., r. 1. The plaintiff can, however, apply to have the writ amended by inserting dates, and then he would be able to so apply.

Q.—What is the mode of proceeding on signing a judgment for non-appearance to a writ specially indorsed when there are two defendants, only one of whom appears ?

A.—The plaintiff may sign judgment against the one who has not appeared, and may issue execution thereon without prejudice to his right to proceed with his action against the one who has appeared : (Ord. XIII., r. 4.) Formerly he waived his right to proceed with his action by issuing execution.

Q.—What was the object sought to be obtained by the provisions in the Common Law Procedure Act, 1852, as to the renewal of a writ of summons, and what is the advantage of a concurrent writ of summons ?

A.—The object of renewing the writ is to keep it in force for all purposes as from the date of the writ. This prevents the Statute of Limitations running against a debt, although the writ be not served : (15 & 16 Vict. c. 76, s. 11 ; see now Ord. VIII., r. 1.)

A concurrent writ facilitates service, for it is sometimes not known where the defendant lives, or there may be several defendants, and as each defendant is entitled to see the original writ at the time of service, duplicate originals, or concurrent writs, as they are termed, are issued, which are in force during the time the original writ is in force : (15 & 16 Vict. c. 76, s. 9 ; see now Ord. VI.)

Q.—Where the defendant pays the debt and the amount of the costs indorsed on the writ, but objects to the costs as being excessive, what is his remedy ?

A.—To have the costs taxed, and where the debt and costs are paid within four days after service of the writ, or in case of a writ for service out of jurisdiction within the time allowed for appearance, if more than one-sixth be disallowed, the plaintiff’s solicitor has to pay the costs of

taxation (Ord. III., r. 7), but if paid after the four days the defendant pays the costs of taxation.

*Q.*—In case of a writ of summons issued against a corporation aggregate, how is the service to be effected?

*A.*—Order IX. r. 8, provides that this may be as heretofore, *i.e.*, on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation. (*a*)

*Q.*—Where a party to be sued in an action resides out of the jurisdiction, what application must be made, and at what stage of the proceedings, to enable the plaintiff to serve a writ of summons upon him, and what facts must be stated in support of such application?

*A.*—Before issuing a writ against a defendant for service out of the jurisdiction, an application must be made to a court or judge for leave to do so: (Ord. II., r. 4.) Leave for service must also be obtained, the application for which must be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or may probably be found, and whether the defendant is a British subject or not, and the grounds upon which such application is made; and it must sufficiently appear that the case is a proper one for service out of the jurisdiction of the court (*b*): (Ord. XI., rr. 1 and 4.)

*Q.*—In what cases is service of a writ on a person out of the jurisdiction allowed? *A.* slanders *B.* when both are out of the jurisdiction. *B.* suffers special damage after his return to England, *A.* remaining abroad. Can *B.* sue *A.* in England?

*A.*—Whenever (*a*) the whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits); or.

(*b*) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action; or,

(*c*) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or

(*d*) The action is for the *administration of personal estate* of any deceased person domiciled within the jurisdiction at the time of his death, or for the *execution (as to property situated within the jurisdiction) of the trusts* of any written instrument of which the person to be served is trustee, which ought to be executed according to the law of England.

(*e*) The action is founded on any breach within the jurisdiction of any contract which by its terms ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland; or

(*f*) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are also sought or not; or

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(*a*) By the 62nd sect. of the Companies Act, 1862, service may be effected upon a company registered under that Act, by leaving the copy writ, or sending it through the post, in a prepaid letter addressed to the company at their registered office.

(*b*) In actions of contract leave cannot be granted if the defendant be domiciled or ordinarily resident in Scotland or Ireland (*ib.*, r. 1 (*e*): *Linden v. Andersen*, "Standard," 3rd December, 1883.)

(g) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction: (Ord. XI., r. 1.)

In the case given B. can sue A. if he is domiciled or ordinarily resident within the jurisdiction, otherwise he must wait until A. comes within the jurisdiction: (*Mostyn v. Fabrigas*, Sm. L. C.)

Q.—In the event of its being necessary to issue a concurrent writ of summons, can a writ for service in England be issued and marked as a concurrent writ with one for service in France?

A.—Yes; and *vice versa* (Ord. VI., r. 2); and under a similar provision in the old practice it was held that concurrent writs could only be issued once on the original writ: (*Cole v. Sherrard*, 26 L. T. Rep. 138.)

Q.—If a debtor absconds before writ issued, can you take any and what proceedings, so as to obtain a judgment, or what course should a creditor pursue?

A.—Yes; by leave of the court or judge the writ may be issued and served upon him out of the jurisdiction, as stated above. (a)

Q.—When a writ of summons for a debt has been personally served on a defendant being a British subject resident abroad, who has not appeared, what steps are necessary in order to obtain judgment, and to ascertain the amount for which such judgment may be signed?

A.—The steps are the same as in case of service within the jurisdiction, viz.:

If the writ is specially indorsed, the plaintiff signs judgment for any sum not exceeding the amount indorsed, with interest at the rate specified, and a sum for costs: (Ord. XIII., r. 3.)

Where the special indorsement is omitted, a proper affidavit of service, with a statement of claim, may be filed, and judgment entered ten days after, as stated *ante*, p. 77: (*Ib.*, r. 12, and Ord. XXVII., r. 2.)

Where the claim is for detinue and pecuniary damages, or either of them, interlocutory judgment is entered, and a writ of inquiry issues to ascertain the value and damages, or the damages only, unless the court or judge order that they be ascertained in any other way: (*Ib.*, r. 4.) (b)

Q.—In what case can you proceed with an action against a foreigner resident abroad?

A.—In all cases where leave to issue and serve notice of the writ is obtained under Ord. XI., r. 1 (see *ante*), and in case of default of appearance, the proceedings are the same as in the case of a British subject out of jurisdiction. Notice of the writ must be served, and not the writ itself: (*Ib.*, r. 6.)

(a) See hereon *Firmin v. Perry* (27 L. T. Rep. 72; *Biret v. Pigot*, 38 *ib.* 149).

(b) In actions assigned by the 34th sect. of the 1873 Act to the Chancery Division in Probate actions, and in cases not otherwise specially provided for, the plaintiff, on filing proper affidavit of service and if the writ is not specially indorsed, a statement of claim proceeds as if the defendant had appeared: (*Ib.*, r. 12.)

**Q.**—In cases where the defendant cannot be arrested, or is out of the kingdom, state the best mode to proceed against him.

**A.**—If the defendant is abroad, leave should be obtained to issue and serve the writ, as above stated. If the defendant is here and you have obtained *final* judgment against him either in default after personal service of the writ, or on a judge's order for substituted service, and you cannot enforce your judgment by a *fi. fa.*, you should apply for an order for payment, &c., under 32 & 33 Vict. c. 62.)

**Q.**—How can the service of a writ be effected where the defendant is a lunatic or person of unsound mind?

**A.**—Either on the committee of the lunatic or on the person with whom the person of unsound mind resides, or under whose care he is, unless the court or judge otherwise order: (Ord. IX., r. 5.)

### *Injunction and Mandamus.*

**Q.**—When can an injunction, *mandamus*, or receiver be granted, and how?

**A.**—By interlocutory order of the court in all cases in which it appears to the court just or convenient, and either unconditionally or upon such terms and conditions as the court thinks just, and if to prevent any threatened waste or trespass, whether the person is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or either of the parties are legal or equitable: (a) (1873 Act, s. 25, sub-s. 8.)

**Q.**—Mention one or more instances in which it would be advisable to claim an injunction.

**A.**—If A.'s mines adjoin B.'s, and A. break through and commence working B.'s mines; or if A. build up and obstruct B.'s ancient lights, or if A. has infringed B.'s patent right, an action may be brought by B. against A.

**Q.**—How does a writ of *mandamus* issue, and how is it obtained?

**A.**—It may be obtained on motion to the court as above stated, but the prerogative writ of *mandamus* can only issue from the Queen's Bench division of the High Court. The claim for the former is endorsed on the writ of summons.

**Q.**—In what cases are writs of *mandamus*, prohibition, and *certiorari*, respectively issued? A client wishes to set aside, as informally held, the poll of ratepayers held after a vestry meeting. How should you proceed?

**A.**—The prerogative writ of *mandamus* is issued out of the Queen's Bench Division (Crown side) to compel any person, corporation, or inferior court to do some particular thing therein specified, which appertains to their office or duty. A prohibition is used to stay proceedings in an

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(a) This question may be answered from the above: Where A. has broken into B.'s mine, and take coal thereout, can B., besides suing in trespass for the damage, obtain protection against a recurrence of the injury? State shortly, in what manner and at what stages of the cause may this be done.

inferior court on the ground of its want or excess of jurisdiction, The writ of *certiorari* may be issued where it is expedient to remove the proceedings from an inferior to a superior court. In the case given the remedy would be by a writ of "*quo warranto*": (see St. O. Bk. V. Oh. xii.)

### *Appearance.*

**Q.**—At what period must a defendant appear to an action?

**A.**—Within eight days after the service of the writ inclusive of the day of service, otherwise the plaintiff may proceed to judgment and execution. The defendant, however, may appear at any time before judgment for want of appearance is actually signed against him; but unless the court or judge otherwise order he will not be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ: (Ord. XII., r. 22.)

**Q.**—How is an appearance entered?

**A.**—By delivering to the proper officer a memorandum in writing dated on the day of its delivery, and containing the name of the defendant's solicitor or stating that the defendant defends in person, at the same time delivering to the officer a duplicate of the memorandum which is sealed with the official seal, showing the date on which it is sealed, and returned. Such duplicate then becomes a certificate that the appearance was entered on the day indicated by the seal: (Ord. XII., r. 8.)

**Q.**—Where a defendant appears in person, and gives a false address, what course should the plaintiff take?

**A.**—He should apply to the court or a judge to set aside the appearance: (Ord. XII., r. 12.)

**Q.**—Where a defendant appears in the London office to a writ issued out of a district registry, to whom and at what time must he give notice of such appearance?

**A.**—He must give notice of appearance on the same day to the plaintiff's solicitor, or to the plaintiff himself if he sues in person, either by notice in writing served in the ordinary way at the address for service, within such district registry, or by prepaid letter directed to that address, and posted on that day in due course of post; and in either case accompanied by the sealed duplicate memorandum of appearance: (Ord. XII., r. 9.)

**Q.**—A writ is issued out of a district registry against two defendants, one living in London, the other in another registry district. Where can appearance be entered, and where would the action proceed?

**A.**—The defendants may appear either in the district registry, or at the Central Office; and if either appears in London the action will proceed in London, but if one only appears in London, the court has power to remove the proceedings to the district registry if satisfied that he is only a formal defendant, or has no substantial cause to interfere in the conduct of the action: (Ord. XII., rr. 5, 7.)

**Q.**—Where a writ is issued out of a district registry, and the defendant resides in such district, can he, as of right, remove the action to London?

if so, what step must he take to remove it, and within what time? Is there any case in which any and what, time must elapse before the defendant can take any steps to remove the action?

*A.*—By Ord. XXXV., r. 13, any defendant may remove the action to London in the following cases:—

Where the writ is specially indorsed under Ord. III., r. 6, and the plaintiff does not, within four days after the appearance of such defendant, give notice of an application for an order against him, under Ord. XIV., then such defendant may remove the action as of right at any time after the expiration of such four days, and before delivering a defence and before the expiration of the time for doing so:

Where the writ is specially indorsed and the plaintiff has made such application as in the last paragraph mentioned, and the defendant has obtained leave to defend, in manner provided by Ord. XIV., then such defendant may remove the action as of right at any time after the order giving him leave to defend, and before delivering defence and before the expiration of the time for doing so:

Where the writ is not specially indorsed, any defendant may remove the action as of right at any time after appearance, and before delivering a defence and before the expiration of the time for doing so.

By r. 14, the party desiring to remove must serve the other parties, and deliver to the district registrar a notice signed by himself, or his solicitor, to the effect that he desires the action to be removed to London, but the court or judge may order the action to proceed in the district registry.

*Q.*—What proceedings can be taken against a solicitor for not entering an appearance in pursuance of his written undertaking to do so?

*A.*—The solicitor is liable to be attached for contempt of court: (Ord. XII., r. 18.)

*Q.*—How should partners appear to a writ when they are sued in the name of their firm?

*A.*—They should appear individually in their own names; but all subsequent proceedings are to continue in the name of the firm: (Ord. XII., r. 15.)

*Q.*—A defendant who has been served with a writ purporting to be issued by a solicitor, wishes to know who the plaintiff is, and where he lives; what steps should he take to obtain the information?

*A.*—The plaintiff's address must now be indorsed upon the writ of summons: (Ord. IV., r. 1.)

*Q.*—When a defendant appears to a writ of summons specially indorsed, he having no defence, can the plaintiff take any, and what, steps to obtain judgment without delivering a statement of claim?

*A.*—The plaintiff, upon filing an affidavit of himself or any other person who can swear positively to the facts verifying the cause of action, and stating that in his belief there is no defence to the action, may call on the defendant to show cause why final judgment should not be signed



against him, which the court or a judge may order as to whole or part, unless defendant satisfy him, by affidavit or otherwise, that he has a good defence on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend: (Ord. XIV., r. 1.)

### *Venue.*

**Q.**—What is the meaning of the word “venue?”

**A.**—The venue signifies the county in which an action is intended to be tried, and from which the jurors are to be summoned. Actions will now be tried in Middlesex unless the plaintiff in his statement of claim, or, where none, in a notice in writing, to be served on the defendant or his solicitor within six days after appearance, name some other county or place for the purpose, or unless a judge otherwise order. Local venue is now abolished, except where otherwise provided by statute: (Ord. XXXVI., r. 1.)

**Q.**—On what grounds and at what time may application be made by a defendant to change the venue?

**A.**—On the ground of saving of expense or convenience, as to witnesses, or that a fair trial is not likely to be had where the venue is originally laid, the application should be made after issue joined.

### *Pleadings.*

**Q.**—What are the pleadings now in an action?

**A.**—“Pleading” includes any petition or summons; and also the statement of claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counter-claim of a defendant: (1873 Act, s. 100).

**Q.**—Within what time must a statement of claim be delivered?

**A.**—By Ord. XX., r. 1, (a) Where the writ is specially indorsed, under Ord. III., r. 6, no further statement of claim shall be delivered, but the indorsement on the writ shall be deemed to be the statement of claim.

(b) Subject to the provisions of Ord. XIII., r. 12, as to filing a statement of claim when there is no appearance, no statement of claim need be delivered unless the defendant at the time of entering appearance, or within eight days thereafter, gives notice in writing to the plaintiff, or his solicitor, that he requires a statement of claim to be delivered.

(c) If no statement of claim has been delivered, and the defendant gives notice requiring the delivery of a statement of claim, the plaintiff shall, unless otherwise ordered by the court or a judge, deliver it within five weeks from the time of the plaintiff receiving such notice.

(d) The plaintiff may (except as in (a) mentioned) deliver a statement of claim, either with the writ of summons, or notice in lieu of writ of summons, or at any time afterwards either before or after appearance, notwithstanding that the defendant may have appeared and not required the delivery of a statement of claim:

Provided that in no case where a defendant has appeared shall a state-



ment be delivered more than six weeks after the appearance has been entered, unless otherwise ordered by the court or a judge.

**Q.**—Within what time must a statement of defence be delivered?

**A.**—Within ten days of the delivery of a statement of claim the defendant must deliver his statement of defence, set-off, or counter-claim (Ord. XXI., r. 6); or, where no statement of claim is received or required, then within ten days after his appearance (*Ib.*, r. 7); to which the plaintiff must reply within three weeks: (Ord. XXIII., r. 1; Ord. XIX., r. 2.)

**Q.**—What form must the statements of claim, defence, and reply take?

**A.**—They must be as brief as the nature of the case will admit, and the court in adjusting the costs of the action must inquire at the instance of any party into any unnecessary prolixity, and order costs occasioned thereby to be borne by the party chargeable with the same: (Ord. XIX., r. 2.)

**Q.**—What may a defendant set up in his counter-claim?

**A.**—A defendant may set-off or set up any right or claim whether it sound in damages or not; and it has the same effect as a cross action so as to enable the court to pronounce a final judgment in the same action both on the original and the cross claim. But the court or judge may, on the application of the plaintiff before trial, if in the opinion of the court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof: (*Ib.*, r. 3. As to nature of counter-claim allowed, see *Cappelleus v. Brown*, No. CII. Bitt. Pract. Cas.; *Allwood v. Miller*, *Ib.* OXCIV.; *Macdonald v. Bode*, *Ib.* CCXXIV.; *Nicholson v. Jackson*, *Ib.* CCXXXIV.)

**Q.**—What advantages are given by the new Acts to a defendant to whom, on a balance of accounts or otherwise, an amount is due from the plaintiff?

**A.**—Where in an action a set-off or counter-claim is established as a defence against the plaintiff's claim, the court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may adjudge to the defendant such relief as he may be entitled to on the merits of the case: (Ord. XXI., r. 17.) Whereas previously to the Judicature Acts he must have brought a separate action.

**Q.**—What advantage has the Judicature Act given to a defendant with respect to the raising of a cross-claim against the plaintiff?

**A.**—By sect. 24, sub-sect. 3 of the Judicature Act, 1873, a defendant may now set up in the action any legal or equitable claim or right against the plaintiff, and the judge has power to grant him the same relief as if he had brought a cross-action, but the common law judges, as a rule, do not favour this mode of proceeding, unless the cross-claim is connected with the original one.

**Q.**—Where a defendant is entitled to contribution, indemnity, or other remedy or relief over against any person not a party to the action, is there any, and what, mode of bringing such third party before the court,

and can the defendant obtain relief against such third party on the hearing of the original action, or in any other, and what manner?

A.—He may, by leave of the court or judge, issue a notice to that effect duly stamped with the writ of summons seal. A copy thereof must be filed with the proper officer and served on such person according to the rules relating to the service of writs of summons, the notice must state the nature and grounds of the claim, and must, unless otherwise ordered by the court or a judge, be served within the time limited for delivering his statement of defence with a copy of the statement of claim, or if there is no statement of claim, then with a copy of the writ of summons in the action (Ord. XVI., r. 48), and if such person desires to dispute the plaintiff's claim in the action as against such defendant or his own liability to the debt, he must enter an appearance within eight days from service of the notice. In default he admits validity of any judgment that may be obtained against such defendant, whether by consent or otherwise, and his own liability to contribute to the extent claimed in the notice (*Ib.*, r. 49). If he appears the party giving such notice may apply to the court or judge for directions as to the mode of having the question in the action determined: (*Ib.*, r. 52.)

Q.—What must every pleading contain?

A.—As concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved, such statement being divided into paragraphs numbered consecutively, and each paragraph containing as nearly as may be a separate allegation. Dates, sums, and numbers, are to be expressed in figures, and no signature of counsel is necessary, but where so settled they shall be signed by him, or if not so settled by the solicitor, or by the party suing or defending in person (Ord. XIX., r. 4): (see *Askew v. North-Eastern Railway Company*, Bitt. Pract. Cas. CXXI.; *Weir v. Barnett and others*, *Ib.* CLIV.; *Dawkins v. Lord Penrhyn*, 4 App. Cas. 59.)

Q.—What pleadings must be printed?

A.—Every pleading containing less than ten folios of seventy-two words, each figure being counted as a word, may be either printed or written, or partly written and partly printed; every other pleading not being a petition or summons must be printed: (Ord. XIX., r. 9.)

Q.—To whom must the pleading be delivered, and how must it be marked?

A.—It must be delivered to the solicitor of every party who appears by solicitor, or to the party if he appears in person; but if no appearance has been entered for any party, then it is delivered by being filed with the proper officer. It must be marked on the face with the date of the day on which it is delivered, and with the reference to the letter and number of the action, the division to which, and the judge (if any) to whom the action is assigned, the title of the action, the description of the pleading, and the name and place of the solicitor and agent (if any) delivering same, or the name and address of the party delivering same if he does not act by solicitor: (*Ib.*, rr. 10, 11.)

Q.—What must the statement of claim state specifically?

A.—The relief which the plaintiff claims, either simply or in the

alternative; it is not necessary to ask for general or other relief, which can always be given, and the same rule applies to any counter-claim made, or relief claimed by the defendant in his defence. Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint, founded upon separate and distinct facts, they must be stated, as far as may be, separately and distinctly. And the same rule applies where the defendant relies upon several distinct grounds of defence, set-off, or counter-claim founded upon separate and distinct facts: (Ord. XX., rr. 6, 7.)

**Q.**—If a party's representative capacity is questioned, how should this be done?

**A.**—If either party wishes to deny the right of any other party to claim as executor or trustee, whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he must deny the same specifically: (Ord. XXI., r. 5.)

**Q.**—What alteration is made with regard to pleas in abatement and new assignment?

**A.**—No plea or defence can be pleaded in abatement (Ord. XXI., r. 20), and no new assignment is necessary; but everything heretofore alleged by way of new assignment may now be introduced by amendment of the statement of claim or by way of reply: (Ord. XXIII., r. 6.)

**Q.**—When need a defendant in possession by himself or tenant in an action to recover land plead his title?

**A.**—If his defence depends upon an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff; otherwise it is sufficient to state, by way of defence, that he is so in possession; and he may then rely upon any other ground of defence which he can prove: (Ord. XXI., r. 21.)

**Q.**—Can "not guilty by statute" be still pleaded?

**A.**—Yes; and it will have the same effect as heretofore. But if the defendant so plead he cannot plead any other defence without the leave of the court or a judge: (a)(Ord. XIX., r. 12.)

(a) By various statutes defendants have been granted the privilege, in cases coming within their operation, to plead the general issue of not guilty, and under that pleading set up special defences which would otherwise require to have been pleaded, as in the following cases:—

*Constables.*—Borough, 5 & 6 Will. 4, c. 76, s. 136; County, 2 & 3 Vict. c. 93, s. 8; Metropolitan, 10 Geo. 4, c. 44, s. 4; Parish, 5 & 6 Vict. c. 109, s. 15; Special, 1 & 2 Will. 4, c. 41, s. 5.

*County Courts.*—Persons acting under, 15 & 16 Vict. c. 54, s. 6.

*Coining.*—24 & 25 Vict. c. 99, s. 33.

*Highways.*—5 & 6 Will. 4, c. 50, s. 109.

*Landlords.*—Persons acting under, 11 Geo. 2, c. 19, s. 21.

*Larceny Act.*—24 & 25 Vict. c. 96, s. 118.

*Malicious Injuries.*—24 & 25 Vict. c. 97, s. 71.

*Metropolis.*—Building Act, 18 & 19 Vict. c. 122, s. 108; Management, 25 & 26 Vict. c. 102, s. 106; Police Magistracy, 2 & 3 Vict. c. 71, s. 55.

*Penal Statute.*—Persons sued on, 21 Jac. 1, c. 4, s. 4.

*Prisons.*—28 & 29 Vict. c. 126, s. 49.

*Public Officers.*—42 Geo. 3, c. 85, s. 6.

(See Jud. Acts by Andrews and Stoney.)

**Q.**—When will allegations of fact in any pleading in an action, not being a petition or summons, be taken to be admitted?

**A.**—If they are not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party; except as against an infant, lunatic, or person of unsound mind not so found by inquisition: (*Ib.*, r. 13.)

**Q.**—Must the facts or grounds of defence or reply appear in the pleadings?

**A.**—All matters which show the action not to be maintainable, or that the transaction is either void or voidable in point of law, must be pleaded; and also all grounds of defence or reply, as the case may be, as, if not raised on the pleadings, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as for instance fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law or Statute of Frauds: (*Ib.*, 15.)

No pleading can, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same: (*Ib.*, r. 16.)

**Q.**—Can a defendant or plaintiff deny generally the facts alleged by the statement of claim or counter-claim?

**A.**—No; each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages: (*Ib.*, r. 17.)

**Q.**—Can either party join issue, and what is the effect of it?

**A.**—Subject to rule 17 of this order the plaintiff by his reply may join issue upon the defence, and each party in his pleading, if any, subsequent to reply, may join issue upon the previous pleading. Such joinder of issue operates as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted: (*Ib.*, r. 18.)

**Q.**—If a party deny a statement contained in the previous pleading, how must the denial be framed?

**A.**—The denial must not be framed evasively, but the party must answer the point of substance. And when a matter of fact is alleged with divers circumstances, it will not be sufficient to deny it along with those circumstances: (*Ib.*, r. 19.)

**Q.**—What is the effect of a bare denial of a contract?

**A.**—It is construed only as a denial of the making of the contract in fact, or of the matters of fact from which the same may be implied by law, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise: (*Ib.*, r. 20.)

**Q.**—How must the contents of a material document be stated?

**A.**—When the contents are material, it will be sufficient in any pleading to state the effect thereof as briefly as possible without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material: (*Ib.*, r. 21.)

**Q.**—How must malice, fraudulent intention, knowledge, or other condition of the mind of any person be alleged?

**A.**—It is sufficient to allege the same as a fact, without setting out the circumstances from which the same is to be inferred: (*Ib.*, r. 22.)

**Q.**—How must notice be alleged?

**A.**—Notice to any person of any fact, matter, or thing, is sufficient if alleged as a fact, unless the form or the precise terms of such notice be material: (*Ib.*, r. 23.)

**Q.**—When a contract or any relation arises from letters or conversations, or from a number of circumstances, how should such a contract or relation be alleged?

**A.**—It will be sufficient to allege such contract or relation as a fact, and to refer generally to such circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one, as to be implied from such circumstances, he may state the same in the alternative: (*Ib.*, r. 24.)

**Q.**—When need matters of fact which the law presumes in a party's favour, or as to which the burden of proof lies upon the other side, be alleged?

**A.**—Neither party need allege such facts unless the same have first been specifically denied—*e.g.*, consideration for a bill of exchange, where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim: (*Ib.*, r. 25.)

**Q.**—When an action proceeds in the district registry, where must the pleadings and other documents be filed?

**A.**—All requiring filing must be filed in the district registry: (Ord. XXXV., r. 19.)

**Q.**—When the writ has been served, what is the next step the plaintiff takes?

**A.**—As soon as the defendant has appeared, if the writ is not specially indorsed, the plaintiff should deliver his statement of claim within five weeks of receiving a notice from the defendant requiring one, or he may do so within six weeks of appearance: (Order XX., r. 1.)

**Q.**—What are the names of the different pleadings in an action?

**A.**—Statement of claim by the plaintiff. Defence by the defendant, which may include a counter-claim, and raise questions between himself, the plaintiff, and third persons. Reply by the plaintiff within three weeks; any subsequent pleading other than a joinder of issue can only be pleaded by leave of the court or judge, and within four days, unless otherwise ordered: (Ords. XX., XXI., and XXIII.)

**Q.**—In what cases must the statement of claim be filed, and in what cases must it be delivered?

**A.**—In all actions not otherwise specially provided for, in case the party does not appear within the time limited for appearance, the action proceeds (Ord. XIII., r. 12), on the filing by the plaintiff of a proper affidavit of service, and a statement of claim if the writ is not specially indorsed.

The statement of claim must be delivered if the defendant appears and requires one : (Ord. XX., r. 1.)

Q.—Can a plaintiff join more than one cause of action in the same suit, or what are the restrictions ? If A. applies to B. for a debt due from B. and C., partners, and in C.'s absence A. is assaulted by B., can A. join these two causes of action ?

A.—The plaintiff may unite several causes in the same action, but a judge may order separate trials to be held (Order XVII., r. 1); but no cause can be joined with an action for recovery of land (except by leave), except claims for mesne profits or arrears of rent or double value in respect of the premises and damages for breach of any contract under which the same are held, or for any wrong or injury thereto (*Ib.*, r. 2); but claims by a trustee in bankruptcy, unless by leave, cannot be joined with any claim by him in any other capacity : (*Ib.*, r. 3.)

In the case given A. can join the two causes of action, as it is not necessary that every defendant should be interested as to all the relief prayed for, or as to every cause of action included therein : (Ord. XVI., r. 5.)

Q.—The plaintiff has claims against the same person on a deed for a trespass, and for a libel, and also on a cause of action on which he must sue as executor. Can any and which of these causes of action be joined in the same action ?

A.—Formerly the cause in which he is executor could not be joined ; but now claims by or against an executor or administrator may be joined with claims by or against him personally if the latter is alleged to arise in respect of the estate of which he is executor or administrator : (Ord. XVIII., r. 5.)

Q.—Give an instance where a plaintiff may recover upon a *quantum meruit* for work done under a special agreement, and what in such a case is the measure of damages ?

A.—If he prove the special agreement and the work done, but not pursuant to such agreement, he may recover upon the *quantum meruit*, for otherwise he would not be able to recover at all. And the measure of damages in such a case is the stipulated price, less the sum which it would take to complete the work according to the agreement : (Chit. Cont., p. 523, 11th edit.)

Q.—What is meant by “pleading” and what by “demurring” ?

A.—Pleading, in its general sense, means the proceedings from statement of claim to joinder of issue. As to demurring, see *infra*.

Q.—How is the objection to the *validity* of a pleading raised ?

A.—Formerly by demurrer, but now by Ord. XXV., r. 1, demurrers are abolished, but either party may raise by his pleading any point of law, which will be disposed of by the judge at or after the trial, unless by consent of the parties or order of the court or judge on application of either party it is disposed of previously : (*Ib.*, r. 2.)

Q.—What is the usual mode of meeting a defective pleading ; and is it available to either party ?



**A.**—The opposite party can apply to have it set aside either wholly or in part as irregular, or amended or otherwise dealt with in such manner or upon such terms as the court or judge thinks fit: (Ord. LXX.)

Or by Ord. XXV., r. 4, the court or judge may order any pleading to be struck out if it disclose no reasonable cause of action or answer, and in any such case, or if frivolous and vexatious, may order the action to be stayed or dismissed, or judgment to be entered.

**Q.**—**A.** sues **B.** (your client) for libel. Statement of claim runs as follows: "1. **B.** is a clergyman. **A.** is a navy. 2. On the 13th March, 1881, **B.** wrote to the sheriff of the county and accused **A.** of having committed murder, wherefore **A.** was arrested and imprisoned for two nights, and suffered damage, &c. **A.** claims 100*l.*" Why is this claim demurrable, or liable to be struck out as embarrassing?

**A.**—The claim would have been formerly demurrable in that it does not allege that the defendant falsely and maliciously wrote the letter in question. It would now be struck out unless leave to amend were given on the ground that the claim disclosed no reasonable cause of action, and when thus amended the remainder of the claim would be liable to be struck out as embarrassing.

**Q.**—What was the distinction between a plea in abatement and a plea in bar? and can the former now be pleaded?

**A.**—A plea in bar was a substantial answer to the action, whilst a plea in abatement was not, but showed that the plaintiff had committed some informality, and pointed out how he ought to have proceeded. No plea or defence can now be pleaded in abatement: (Ord. XXI., r. 20.)

**Q.**—Within what time must the defendant deliver his defence; and if he does not plead in due time, what course does the plaintiff adopt in actions of assumpsit, debt, &c.?

**A.**—The defendant, where a statement of claim is delivered, must deliver his defence within ten days after delivery of the statement of claim, unless he obtain an extension of this time from the court or a judge; otherwise the plaintiff may sign judgment. Where no statement of claim is received or required, he must deliver his defence (if any) within ten days after appearance, unless the time is extended: (Ord. XXI., rr. 6, 7.)

**Q.**—An order for three days' time to put in a defence is dated on a Friday; on what day may the plaintiff sign judgment in default thereof?

**A.**—Not until the following Wednesday: (Ord. LXIV., r. 2.)

**Q.**—What alteration has recently been made, in practice, with reference to the time to deliver, or amend pleadings?

**A.**—The time for delivering or amending any pleading may be enlarged by consent in writing, without application to the court or judge as formerly: (Ord. LXIV., r. 8.)

**Q.**—When an order for better particulars of plaintiff's demand is obtained, with a stay of proceedings in the meanwhile, pending the time



allowed for pleading, what time is allowed to the defendant to plead after the delivery of the particulars ?

A.—The defendant is allowed the same time for pleading after the delivery of the particulars under a judge's order, which he had at the return of the summons, unless otherwise provided for in such order : (Ord. XIX., r. 8.)

Q.—When, after a judge's order for further time to plead, further time is required, within what time should the summonses for further time be served and returnable, in order to prevent judgment by default ?

A.—Before the expiration of the time given by the first order. However, if the summons is served on the day the time for pleading expires, returnable at eleven o'clock the following morning, it would prevent the plaintiff signing judgment by default, for a summons is a stay of proceedings from the time it is returnable until disposed of ; but this is a dangerous course to take.

Q.—State some of the usual defences to an action, and the mode of making them.

A.—The usual defences in an action on contract are a denial of the contract, payment, tender, set-off, coverture, infancy, release, or Statute of Limitations, &c. In actions of tort, the defence usually is a denial of the wrongful act or breach of duty (not guilty), and occasionally leave and licence, or *son assault demesne*, &c.; a counter-claim can now be delivered in either case. The facts appear in the defendant's statement of defence. No plea or defence can now be pleaded in abatement : (Ord. XXI., r. 20.)

Q.—Where a pleading is scandalous, or tends to prejudice, embarrass, or delay the fair trial of the action, what course should be taken ?

A.—Application should be made to the court or judge to strike it out or amend it ; and that the costs of the application be paid as between solicitor and client : (Ord. XIX., r. 27.)

Q.—How does a married woman now defend an action ?

A.—By Order XVI., r. 3, married women may now sue and be sued as provided by the Married Women's Property Act, 1882.

Q.—What is the consequence of the non-joinder of persons as plaintiffs ?

A.—In case of mistake the additional plaintiffs may be ordered to be added by the court or judge, upon such terms as seem just, but their consent in writing must be obtained for this purpose : (Ord. XVI., rr. 2, 11.)

Q.—When an action of contract is brought against one of several partners, what step ought the defendant to take ?

A.—Pleading in abatement is now abolished, defendant should apply to have his partners added : (*Ib.*)

Q.—When a defendant is added, how should the plaintiff proceed ?

A.—Unless otherwise ordered, the plaintiff should file an amended copy of, and sue out a writ of summons, and serve such new defendant with such writ or notice thereof in the same manner as original defendants are served : (*Ib.*, r. 13.)

**Q.**—How is advantage to be taken of a cause of defence arising after statement of defence and before verdict?

**A.**—The defendant may, within eight days after such cause of defence arises, or at any subsequent time, by leave of the court or judge, deliver a further defence: (Ord. XXIV., r. 2.)

**Q.**—State the effect of this pleading.

**A.**—Formerly it waived the former defence, and put the cause in the same state as if it had been originally pleaded: (*Barber v. Palmer*, 1 Salk. 178.) It seems doubtful if this be so now, but plaintiff may confess the plea: (see *infra*.)

**Q.**—If a defence arising after the commencement of the action be pleaded, how may the plaintiff proceed?

**A.**—The plaintiff may deliver a confession of such defence and sign judgment for his costs up to the time of pleading it, unless otherwise ordered: (Order XXIV., r. 3.)

**Q.**—If a defendant, sued by two joint plaintiffs, pleads that after action brought one of them released him, is this a good defence against both? And in what manner can the plaintiffs obtain their costs in such a case?

**A.**—This is a good defence against both, if the release is under seal or for valuable consideration: (Ohit. Cont. 709, 713, 11th edit.) The plaintiffs should confess the plea, and will be entitled to the costs up to the time of pleading it: (Ord. XXIV., r. 3.)

**Q.**—What is the effect of a release given to one of two or more joint and several debtors?

**A.**—It would discharge all the debtors, unless the release contained a proviso that it should not operate to deprive the plaintiff of any remedy against the other parties: (Ohit. Cont. 715, 11th edit.)

**Q.**—In an action on a warranty, will a defence traversing the agreement alleged in a statement of claim operate as a denial of the facts of the sale, and of the warranty, and of the breach? and what is the effect?

**A.**—This defence denies the fact of the sale and warranty, but not the breach, and by Order XIX., r. 13, every allegation of fact in any pleading, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, is taken to be admitted, except as against an infant, lunatic, or person of unsound mind.

**Q.**—May payment be given in evidence in reduction of damages, or must it in all cases be pleaded, and why?

**A.**—It must be alleged specifically: (see Ord. XIX., r. 15.)

**Q.**—How far is payment into court an admission of the cause of action?

**A.**—It admits the claim or cause of action in respect of which it is made, unless the defendant denies his liability in his defence: (Ord. XXII., r. 1.)

**Q.**—In what case may a defendant plead payment into court in an action for libel?

**A.**—Formerly, where the defendant was the proprietor of a newspaper or other publication, in an action for libel contained therein, he might pay money into court with a plea that the libel was inserted without malice or gross negligence, and that a full apology had been inserted in the publication : (6 & 7 Vict. c. 96, s. 2.) Now he may pay it in any action for debt or damages : (see Ord. XXII., r. 1.)

**Q.**—When may a defendant pay money into court ?

**A.**—Any defendant, in an action for debt or damages, may, before or at the time of delivering his defence, or by leave of the court or judge at any later time, pay into court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which it was paid in, or he may pay it in with a defence denying liability, except in actions of libel or slander (Ord. XXII., r. 1); but if made before delivering his defence, the defendant must serve upon the plaintiff a notice that he has paid in such money and in respect of what claim, in the Form No. 3 in the Appendix (B.), with such variations as circumstances may require : (*Ib.*, r. 4.)

**Q.**—What does the plea of not guilty deny in actions of tort ?

**A.**—Formerly it only denied the breach of duty or wrongful act alleged to have been committed by the defendant, and not the facts stated in the indictment ; and no other defence than such denial was admissible under such plea ; all other pleas in denial must have taken issue on some particular matter of fact alleged in the declaration : (see R. Pl. 16.) The new rules are silent on the subject.

**Q.**—When the defendant pleads not guilty by statute, intending to give special matter in evidence by virtue of an Act of Parliament, what particulars should accompany the pleading ?

**A.**—The defendant must insert in the margin of the pleading the words "By Statute," together with the year or years of the reign in which the Act or Acts upon which he relies were passed, and also the chapter and section thereof, and specify whether such Acts are public or otherwise ; otherwise such pleading will be taken not to have been pleaded by virtue of any Act of Parliament (Ord. XXI., r. 19), but no other defence can be pleaded with it without leave : (see Ord. XIX., r. 12.)

**Q.**—What is the effect of pleading the general issue by statute ?

**A.**—By Order XIX., r. 12, it has the same effect as heretofore ; such a plea therefore puts in issue not only the defence peculiar to the statute under which it is pleaded, but all that would have arisen at common law. Accordingly, the plea of not guilty "by statute" pleaded under the 11 Geo. 2, c. 19, s. 21, in an action for excessive distress, puts in issue not only the matter of justification, but the tenancy and ownership of the goods : (see Chit. Arch. 267, 13th edit.)

**Q.**—What is necessary to make an equitable defence a good defence to an action ?

**A.**—It is now a good defence in any case in which it would have been formerly in Chancery : (1873 Act, s. 24, sub-sect. 4.)

**Q.**—When is a new assignment necessary ?

**A.**—It is no case now ; for everything which has heretofore been alleged

by way of new assignment may now be introduced by amendment of the statement of claim or by way of reply: (Ord. XXIII., r. 6; see *Hall v. Eve*, on appeal, 46 L. J. 145, Ch.)

*Q.*—Can a plaintiff at any, and what, stage of the cause discontinue his action without leave, and by what proceeding can he withdraw part only of his alleged cause of complaint?

*A.*—The plaintiff may, at any time before the receipt of the defendant's statement of defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay the defendant's costs of the action, or, if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn, and this will be no defence to any subsequent action: (Ord. XXVI., r. 1.)

*Q.*—Defendant pleads defence and counter-claim to plaintiff's statement of claim. Plaintiff shortly after discontinues. What is defendant's position with regard to his counter-claim?

*A.*—The counter-claim still continues as if it were statement of claim in a cross action, and, unless the discontinuing plaintiff puts in a defence, judgment on the counter-claim may be signed in default: (*McGowan v. Middleton*, 52 L. J. 355, Q. B.; Ord. XXI., r. 16.)

*Q.*—When is a cause at issue? What is an issue? Can there be more issues than one? And how are issues in fact and issues in law raised?

*A.*—When the pleadings have arrived at an affirmation on the one side and a denial on the other, the cause is said to be at issue, and either party may join issue. There may be several issues, both of fact and law, (a) all raised by the pleadings, *demurrers* being now abolished.

*Q.*—What is a feigned issue? In what cases is it resorted to, and by what authority is it framed?

*A.*—It is a mode adopted, without any regular set of pleadings, for determining some question of fact by a jury, as under the Interpleader Act, or the Tithe Commutation Act, &c. The 8 & 9 Vict. c. 109, enacts that where any court of law or equity may desire to have any question of fact decided by a jury, such court may direct a writ of summons to be sued out, and direct who are to be plaintiffs and who defendants, &c., and thereupon the proceedings are to go on, and be brought to a close as heretofore in feigned issues. The form given is not compulsory. The old practice under the Interpleader Acts is retained by Ord. I., r. 2.

*Q.*—What is a special case? How is it prepared and brought before the court for argument?

*A.*—A special case occurs where in the course of an action there is no dispute as to the facts, but the opinion of the court is desired on the law applicable to them. The case is in the form of a narrative, and may be

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(a) By the Procedure Act, 1852, questions of fact might, after writ issued, by consent and leave of a judge, be raised without pleadings. So, in like manner, questions of law might be raised: (ss. 42, 46.)

stated at any time after writ. After it is printed and signed by the parties or their solicitors, and filed, it is entered for argument by delivering to the proper officer a memorandum for that purpose. If any party is under disability, leave is required to set it down, and an affidavit must be filed verifying the statements affecting him: (Ord. XXXIV.)

**Q.**—When must notice of trial be given?

**A.**—The plaintiff with his reply, or at any time after the close of the proceedings, may do so, and if he does not do so within six weeks of the close of the pleadings the defendant may do so, or may move to dismiss: (Ord. XXXIV., r. 12.)

**Q.**—Give a summary of the principal provisions relating to the mode of trial of questions of fact.

**A.**—The trial of an action may be:

1. Before a judge and jury.
2. Before a judge.
3. Before a judge sitting with assessors.
4. Before an official referee, with or without assessors.
5. Before a special referee, with or without assessors: (Ord. XXXVI.)

The plaintiff can select the place of trial by naming it in his claim, or if no claim, by a notice in writing, to be served on the defendant or his solicitor within six days after appearance, but the court or a judge may change it: (*Ib.*, r. 1.)

The court or judge may order different questions of fact to be tried in different ways, and may direct the order in which, and the place at which, the several issues of fact shall be tried: (r. 8.)

The court or judge may order any question of law to be determined before the trial of questions of fact: (Ord. XXXIV., r. 2.)

The court or judge may direct the trial without a jury of any question which could before the Act of 1873, without consent, be tried without a jury: (Ord. XXXVI., r. 4.)

**Q.**—How many days are necessary for full or ordinary and short notice of trial respectively, whether in a town or a country cause?

**A.**—Ten days' notice of trial are given and are sufficient in all cases, unless the defendant has consented, or is under terms, to take short notice, when four days are sufficient: (Ord. XXXVI., r. 14.)

**Q.**—Does notice of trial operate for any particular sittings?

**A.**—Not in London or Middlesex; but it is deemed to be for any day after the expiration of the notice on which the action may come on for trial in its order upon the list. If in the country it will be deemed to be for the first day of the then next assizes, at the place for which notice of trial is given: (Ord. XXXVI., rr. 17, 18.)

**Q.**—Can notice of countermand be now given?

**A.**—Only by consent or leave of a court or judge upon such terms as to costs or otherwise as may be just: (Ord. XXXVI., r. 19.)

**Q.**—If a cause be made a remanet, is a new notice of trial necessary either in a town or a country cause?

**A.**—The old practice does not appear to be altered (see Ord. XXXVI.,

rr. 17, 18), by which, if the record were made a remanet at the assizes, the plaintiff could not afterwards proceed to trial without giving a new notice of trial; but if made a remanet from one sitting to another, in London or Middlesex, a new notice was not necessary: (see Chit. Arch. 344, 13th edit.; but see *Claudit v. Prince*, 16 L. T. Rep. N. S. 397.)

**Q.**—If a plaintiff makes default in proceeding to trial, is there any, and if any what, course by which a defendant can bring the cause on for trial?

**A.**—If the plaintiff omits to give notice of trial within six weeks of the close of the pleadings, the defendant may do so, and may enter the action for trial (Ord. XXXVI., r. 12), and notice of trial once given cannot now be countermanded unless by consent or order (*Ib.*, r. 19), and the record cannot now be withdrawn or the action then discontinued without leave of the court or judge (Ord. XXVI., r. 1), and when withdrawn it will not be allowed to be re-entered without leave: (see Bitt. Pract. Cas. XIV.)

**Q.**—An action of debt is brought in the High Court, the sum indorsed on the writ not exceeding 20*l*. Can an order be now made for a trial before the sheriff, or any and what other inferior tribunal? State by which party and at what stage of the proceedings such an order may be applied for.

**A.**—No action can now be sent to the sheriff for trial. But a judge at chambers may, on the application of the defendant within eight days after service of the writ in actions of contract not exceeding 50*l*., order the action to be tried in the County Court, if it is contested, and there be no good reason to the contrary. If the order is made, the cause will then be remitted to the County Court, and there tried in the ordinary way; and the costs subsequent to the order will be those allowed in the County Court: (30 & 31 Vict. c. 142, ss. 6, 7; 1873 Act, s. 67.)

**Q.**—In what cases and at what stages of the proceedings can action of contracts or tort brought in a Superior Court be sent to a County Court by the plaintiff or defendant? Distinguish the different cases in your answer.

**A.**—By 19 & 20 Vict. c. 108, s. 26, in actions of contract, either party may, after issue joined, where the amount in dispute does not exceed 50*l*., apply for an order that such issue may be tried in a County Court. So by 30 & 31 Vict. c. 142, s. 7, in similar cases the defendant may do this within eight days of service; and by sect. 10 of the same Act, in actions of tort, on his making an affidavit that plaintiff has no visible means of paying the costs if he (the defendant) obtains a verdict, an order may be obtained that, unless the plaintiff gives security for costs, or satisfy the judge that he has a cause of action fit to be prosecuted in the Superior Court, proceedings be stayed, or the cause remitted to a County Court: Actions in the Chancery Division which might have been commenced in the County Court may be removed there under sect. 8 of the same Act.

**Q.**—In an ordinary action for breach of contract, what papers do you lay before counsel with the brief? Of what does this latter consist, and what is the object to be borne in mind in drawing observations?



**A.**—Copies of all pleadings, affidavits as to facts and documents, notices to admit and produce, and of documents material to the case, should be laid before counsel with the brief, which should contain a statement of the case, followed by the proofs of the witnesses intended to be called, and notes and suggestions to be used for the purpose of cross-examination of the witnesses on the opposite side. The object to be borne in mind in drawing observations is to bring the leading points of the case clearly before counsel.

*Interlocutory or Collateral Proceedings.*

**Q.**—What is meant by interlocutory proceedings ?

**A.**—All proceedings which take place between the commencement of the action and its termination are, strictly speaking, interlocutory : (Holth. L. D. 2nd edit.) But what is generally understood by interlocutory proceedings are such as applications for time to plead, for delivery of particulars of demand, set-off, to change the venue, to set aside proceedings for irregularity, and the like.

**Q.**—What is a judge's summons and how and upon whom must it be served ?

**A.**—It is (in effect) a direction for the party upon whom it is served to appear at judge's chambers at a certain time, and to show cause why the order asked for by it should not be granted. It must be served upon the solicitor of the party against whom it is issued, or, if the party is appearing in person, at his place for service ; the service must be effected before two o'clock p.m. on Saturdays, and before six on other days, otherwise it will be taken as served on the following day.

**Q.**—Point out any defects or irregularities in the proceedings which would entitle a defendant to apply to set them aside.

**A.**—If the writ be improperly tested ; or does not contain the necessary indorsements ; or if the plaintiff sign judgment too soon ; or proceeds to trial without notice and gets a verdict : (Ohit. Arch. 1192, 13th edit.)

— **Q.**—Within what time must application be made to a court or judge to set aside proceedings for irregularity ? and what will preclude a person from making such application ?

**A.**—The application must be made within a reasonable time, without having taken a fresh step, after notice of the irregularity : (Ord. LXX., r. 2.)

**Q.**—When a summons is applied for to set aside proceedings for irregularity, what must be stated therein ?

**A.**—The several objections intended to be insisted upon : (*Ib.*, r. 3.)

**Q.**—State the distinction between an irregularity in practice and a nullity.

**A.**—A proceeding is said to be irregular when taken too soon or too late or in an improper manner. Where the mistake, however, consists not in a mere manner, but in the substance of the thing done, it is not only irregular, but a nullity and void altogether. When the proceeding amounts to a nullity, it cannot be waived by the opposite party taking a fresh step, as an irregularity may : (see Ohit. Arch. 1192, 13th edit.)



**Q.**—In what actions may a defendant plead a tender of amends and pay money into court?

**A.**—In all actions for debt or damages it may now be paid in: (Ord. XXII., r. 1.)

**Q.**—In what cases must leave be obtained for payment of money into court?

**A.**—When defendant pays it in after delivering his defence, leave must be obtained (Ord. XXII., r. 1); and in actions of detinue: (23 & 24 Vict. c. 126, s. 25.)

**Q.**—What are the requisites to constitute a valid tender?

**A.**—There must be an actual production and offer of the sum due, unless the creditor dispense with it by a declaration that he will not accept it; and this tender must be of *money*; if beyond forty shillings, in gold; or, if above 5*l.*, may be in Bank of England notes; which are a legal tender, except by the Bank itself and its branches. (a) The tender is not good if accompanied by any condition: (see Sm. M. L. 534, 7th edit.; Arch. New Pract. 88, 2nd edit.)

**Q.**—For what amounts respectively are gold and silver and bronze coins legal tender?

**A.**—Gold to any amount, silver for any amount not exceeding forty shillings, and bronze coins not exceeding one shilling: (33 Vict. c. 10, s. 4.)

**Q.**—To what actions can a tender of money before action be pleaded?

**A.**—To any action for a debt or liquidated demand: (3 Ste. C. 524, 8th edit.)

**Q.**—If a tender has been made and refused before action, what steps should be taken to prevent the party availing himself of it by pleading in any action to be afterwards commenced?

**A.**—The plaintiff or his agent should afterwards demand from the defendant the exact sum tendered, and if not paid this will prevent the defendant availing himself of the tender by pleading in an action afterwards commenced: (Arch. New Pract. 88, 2nd edit.)

**Q.**—Is a tender of part of a debt good where the whole is due, although the debtor *bond fide* believes that nothing more than the sum tendered is due?

**A.**—No; tender of part of an entire demand is invalid: (Chit. Cont. 733, 11th edit.)

**Q.**—If the defendant has tendered previous to the action what he considers sufficient to cover the demand against him, what is the mode of proceeding, and will the plaintiff have to receive or pay the costs of the action in case he does not recover more than the amount tendered? (b)

(a) Country bank notes are a good tender if not objected to on that ground: (Sm. M. L. 534, 7th edit.) And it seems a tender under protest is good: (*Scott, P. O. v. The Uxbridge, &c., Railway Co.*, 14 L. T. Rep. N. S. 596.) Colonial gold issued from Her Majesty's branch mints is now a legal tender: (29 & 30 Vict. c. 65, and Orders of January, 1867; but see also 33 Vict. c. 10.)

(b) Also put thus: What is the effect of a tender before action?

A.—The defendant must pay the money into court, and plead the tender (Order XXII., r. 3); if the plaintiff on the trial recovers nothing beyond the sum tendered, he will not be entitled to any costs, but will have to pay the defendant's costs, unless otherwise ordered: (Tidd's Prac. 622, 971, 9th edit.; Gray on Costs, 306; Ord. LXV., r. 1.)

Q.—If a person is sued for 50*l.*, of which he admits he owes 30*l.*, but did not tender it before the action, what steps should be taken to avoid further liability for costs in the event of the plaintiff recovering no more than 30*l.*?

A.—He should bring the 30*l.* into court, which he may now do any time after service of the writ, and if the plaintiff recovers no more, the defendant will be entitled to his costs from the time of payment in, unless otherwise ordered.

Q.—After delay of the proceedings for a year, what notice must now be given by a party who desires to proceed?

A.—A calendar month's notice must be given by the party desiring to proceed, whether plaintiff or defendant: (Ord. LXIV., r. 13.)

Q.—If a plaintiff does not proceed in his action in due course after appearance or pleading, can the defendant compel him to proceed, and how?

A.—Yes; the defendant may, after the time for delivering statement of claim has passed, apply to the court or a judge to dismiss the action with costs for want of prosecution: (Ord. XXVII., r. 1.) In default of reply the proceedings are deemed to be closed, and the statement of fact in the last pleading admitted, and if the plaintiff does not, within six weeks, give notice of trial, the defendant can do so, or may move to dismiss: (Ord. XXXVI., r. 21.)

Q.—On what other grounds may an action be dismissed for want of prosecution?

A.—If a plaintiff fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, in addition to attachment, he is liable to have his action dismissed for want of prosecution: (Ord. XXXVI., r. 21.)

Q.—In the event of the death of a sole defendant, has the plaintiff any means, and what, of continuing the action against the representatives of the deceased defendant? Have the representatives of a deceased defendant any and what means of compelling a plaintiff to continue or abandon the action?

A.—If the cause survive it may be continued against the representatives of defendant by the plaintiff obtaining an order *ex parte* for that purpose upon allegation of the facts, and may serve such executor or administrator with such order, and such executor or administrator must then appear within eight days (Ord. XVII., rr. 4, 5), but he may apply within twelve days to vary or discharge the order, or the representatives of the deceased defendant may apply as above to be made parties: (*Ib.*, r. 6.)

Q.—Is a summons without an order a proceeding; or a notice of trial, though countermanded?

A.—A summons without an order is not a proceeding in the cause, because it is not complete in itself; but a notice of trial is, though countermanded: (Ord. LXIV., r. 13.)

Q.—If a defendant quits, and altogether gives up his place of residence, after service of a copy of the writ of summons, but before the plaintiff has delivered his statement of claim, how do you proceed in your action?

A.—If he has appeared by a solicitor, the statement of claim must be delivered at the address for service of the solicitor, or at his own address for service if he has appeared in person. And if the defendant makes default in delivering a statement of defence within ten days, the plaintiff may sign judgment final or interlocutory, as the case may be. If the defendant has not appeared, and the writ is specially indorsed, sign final judgment; if not specially indorsed sign interlocutory judgment (Chit. Arch. 790, &c., 13th edit.); or file proper affidavit of service and statement of claim where liquidated under Ord. XIII., r. 12; and final judgment at the expiration of ten days: (Ord. XXVII., r. 2.)

Q.—When the writ does not disclose the particulars of the plaintiff's demand, in action of assumpsit or debt, &c., how are they to be obtained, and can they be obtained before appearance?

A.—They may be obtained by summons at chambers, which may be had before appearance: (see *Baker and another v. Wood*, Bitt. Pract. Cas. COLXXXII.; but see *contra*, *Ib.* CV. and CXXIV.)

Q.—When particulars of demand are indorsed on the writ, can any other particulars be given with the statement of claim?

A.—Yes; the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ: (Ord. XX., r. 4.)

Q.—Under what circumstances can a defendant obtain an order for particulars in an action for trespass, and how?

A.—In actions of trespass the defendant cannot as a matter of course obtain a judge's order for particulars of demand. But in special circumstances an order may be obtained. Thus, in an action against the sheriff for an escape, the plaintiff may be compelled to give particulars of the time and place of the escape: (Chit. Arch. 1178, 13th edit.)

Q.—How is time computed upon the rules of practice in the course of a cause? If a party has four days to do any given act from the first of the month, when does that time expire?

A.—If not expressed to be clear days, they are reckoned exclusively of the first day, and inclusively of the last day, unless the last day falls on a Sunday, Christmas-day, Good Friday (which also do not count in a period of less than six days), or a day appointed for a public fast or thanksgiving, in which case the act will be duly done if done on the day the offices next open: (Ord. LXIV., rr. 12, 2, 3); the time does not expire until the fifth, and this gives the whole of the fifth to do the act.

Q.—Where several actions are brought against different underwriters on the same policy, can they take any and what steps to save unnecessary expense?

A.—Yes; actions pending in the same division may be consolidated by order of the court or a judge, as heretofore: (Ord. XLIX., r. 8.) Application should be made by *the defendants* to a judge at chambers, who will stay the proceedings in all the actions but one, they undertaking to abide by the verdict in that one: (see Sm. Act. 106, 10th edit.) But this will not prevent the plaintiff going on with another of the actions if he fail in the first: (*McGregor v. Horsfall*, 3 M. & W. 320.)

Q.—When several actions are brought against different persons relating to the same matter, what steps should they take to prevent unnecessary expense?

A.—On application to the court they may obtain an order to stay the proceedings in all the actions but one, on their undertaking to be bound by the proceedings in such action, and subject to such other terms as the court may think proper: (Prentice's Proceedings in an Action, 108, 2nd edit.)

Q.—When a defendant in an action of contract suffers judgment to go by default, how should the plaintiff proceed to ascertain the amount due to him?

A.—If the writ is not specially indorsed and the plaintiff's claim is for a debt or liquidated demand, the plaintiff may file an affidavit of service, or notice in lieu of service, and a statement of his claim in respect of the causes of action stated in the indorsement upon the writ; and may, after ten days, enter final judgment for the amount (not exceeding the sum indorsed upon the writ), and costs to be taxed (Ord. XIII., r. 12; and Ord. XXVII., r. 2); or if not for a debt or liquidated demand, he must proceed by writ of inquiry; or, where the amount of damages sought to be recovered is substantially a matter of calculation, before one of the masters of the court; or the court or a judge may order, instead of a writ of inquiry, that the damages be ascertained in any way in which any question arising in an action may be tried: (Ord. XIII., r. 6.)

Q.—Where a defendant, in an action brought against him as acceptor of a bill of exchange or drawer of a promissory note, suffers judgment to go by default, how should the plaintiff proceed to ascertain the amount due to him?

A.—If the writ is specially indorsed, the judgment by default is final in the first instance. If not, the plaintiff must proceed as above stated.

Q.—What is the effect of the death of a sole plaintiff or defendant before trial?

A.—This does not now abate the action; but if the cause thereof survive, it may be continued by or against the personal representatives of the plaintiff or defendant by obtaining an order that the proceedings in the action shall be carried on between the continuing parties to the action and such new party or parties. This may be obtained *ex parte* upon an allegation of such change or transmission of interest or liability: (Ord. XVII., r. 4.) The application may be made to a master on affidavit of the change or transmission of interest or liability: (Ooe's Pr. Judges' Chambers, 67.)

Q.—If A. and B., joint owners of a house, sue C., their tenant, for

damages for breach of covenant, and (1) A. dies, (2) C. dies, what is the effect in each case on the action?

A.—On A.'s death, the cause of action surviving to B., he could continue the action. On C.'s death, an *ex parte* order to continue the action against his representatives must be obtained: (Ord. XVII., rr. 1, 4.)

## EVIDENCE.

**Question.**—Into what divisions is evidence usually classed? What is secondary evidence, and are there any degrees of secondary evidence?

**Answer.**—Evidence is usually divided into *primary* and *secondary*. Primary evidence is the best or highest evidence, or in other words, that kind of proof which in the eye of the law affords the greatest certainty of the fact in question. All evidence falling short of this in its degree is called secondary. There are no degrees of secondary evidence: (1 Tay. Ev. pt. 2, c. 4, s. 365.)

**Q.**—Is, or is not, secondary evidence always of the same degree of legal value as compared with primary evidence? Illustrate your answer by an instance.

A.—The distinction between primary and secondary evidence is one of law and not of fact, referring only to the *quality* and not to the *strength* of the proof. Therefore, if a deed be lost and production of it is out of the party's power, secondary evidence of its contents will be received either by an attested or examined copy, or even by oral evidence of any one who can positively swear to the contents of the original. But although oral evidence of a document is equally *admissible* with an examined or attested copy, it is not therefore entitled to the same *credibility*: (1 Tay. Ev. pt. 2, c. 4, s. 365 *et seq.*; Pow. Ev. 302, 303.)

**Q.**—Give an instance of hearsay evidence. When is it admissible in evidence?

A.—When a witness attempts to prove a fact by stating that someone else told him that fact, this is (inaccurately) called hearsay evidence, and such secondary evidence is inadmissible, except in the following cases:

1. When the words spoken of are part of the "*res gestæ*."
2. The evidence of a deceased witness on a former trial between the same parties for the same cause is receivable, and may be proved by the testimony of a person who heard it.
3. Proof of matters of public and general interest, such as the boundaries of counties or parishes, rights of common, claims of highway, &c. Hearsay in this case must have been "*ante litem motam*."
4. Matters of pedigree, the declarations of deceased members of the family being evidence if made "*ante litem motam*."
5. Ancient documents purporting to constitute part of, or at least, to have been executed contemporaneously with the transactions to which they relate, and, coming from proper custody are receivable as evidence of *ancient possession*.
6. Declarations by deceased persons against their interest are receivable in evidence in proceedings between third parties, provided such declara-

tions were made against *proprietary* or *pecuniary* interest, and do not derogate from the title of third parties: (*Higham v. Ridgway*, 10 East. 109.)

7. Declarations by deceased persons in the regular course of business: (*Price v. E. of Torrington*, 2 Ld. Raymond, 273.)

8. In charges of homicide the declarations made by persons under the conviction of their impending death: "*Nemo moriturus præsuntur mentiri*:" (see Best on Evidence, 6th edit. 631 *et seq.*)

9. Statements made by a third person, if the plaintiff or defendant is proved to have been present when it was made.

10. Evidence as to character.

Q.—What alteration in the law of evidence has been made by recent statutes? (a)

A.—By the 6 & 7 Vict. c. 85, criminals, and interested persons not being parties, and by the 14 & 15 Vict. c. 99, the parties to suits (except in breach of promise and adultery cases), &c., are competent and *compellable* to give evidence on behalf of either or any of the parties to the suit, &c. However, no person is compellable to answer questions tending to criminate himself. By the 16 & 17 Vict. c. 83, husbands and wives are rendered competent and compellable in all *civil* cases to give evidence on behalf of either or any of the parties to the suit, &c. But this section does not extend to criminal cases (s. 2); and neither husband nor wife is competent or compellable to disclose any communication made to each other during marriage. But by the 32 & 33 Vict. c. 68, the parties to an action for breach of promise of marriage are competent witnesses in such action, but their evidence must be corroborated: (s. 2.) So the parties in proceedings for adultery, and their husbands and wives, are competent witnesses therein, but are not bound to confess the adultery unless such witness has already given evidence therein in disproof of adultery: (s. 3.) And persons objecting to take an oath may, by leave, give evidence on declaration: (s. 4.) By the 17 & 18 Vict. c. 125, a document not requiring attestation to its validity may be proved by admission or otherwise; and unstamped documents may be received in evidence on depositing the amount of the stamp, penalty, and an additional penalty of one pound. By 38 & 39 Vict. c. 77, s. 20, the rules of evidence are not affected by the Judicature Acts and Rules of Court.

Q.—What evidence is necessary to support the plaintiff's case in an action for breach of promise of marriage? Refer, if you can, to any statute affecting this question.

A.—The plaintiff's evidence can now be received as to the promise, but it must be corroborated by some material evidence: (see 32 & 33 Vict. c. 68.) The breach must also be proved and the damage sustained.

Q.—In what case, and how, may a party producing a witness impeach his credit?

A.—By sect. 22 of the second Common Law Procedure Act (17 & 18 Vict. c. 125), where a party calls a witness who in the opinion of the

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(a) Also put thus: Has any alteration been made lately by the Legislature with regard to evidence, and as to the competency of interested parties as witnesses?



judge proves adverse, he may contradict him by other evidence, or by leave of the judge prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such a statement: (see Notes to Day's Common Law Procedure Acts on above section.)

**Q.**—If a witness is a convicted felon, or has an interest in the result of the action, can his testimony be received?

**A.**—Yes; by force of the statutes set out in a preceding answer.

**Q.**—What is the distinction between the admissibility and the credibility of a witness?

**A.**—The former relates to the competency of the witness to give evidence, and is a question for the judge; the latter to the truthfulness of his statements, and is a question for the jury: (Prow. Ev. 15.) If a person believes in a God, in a future state of rewards and punishments, this entitles him to be admitted as a witness: (*Omichund v. Barker*, 1 Sm. L. C. 195, &c.) By the 32 & 33 Vict. c. 68, it is also enacted that if a witness (either in civil or criminal cases) objects to take an oath, or is objected to as incompetent to take an oath, he, by leave of the presiding judge, may give evidence on declaration, and be liable to the penalties of perjury for false evidence: (s. 4.)

**Q.**—In an action on a bill of exchange, drawer against acceptor, and the defendant pleads payment only, has the plaintiff anything, and what, to prove?

**A.**—The plaintiff will have to rebut the defendant's plea of payment only, as every allegation of fact, if not denied or stated to be not admitted in the pleading of the opposite party, will be taken to be admitted: (Ord. XIX., r. 13, *ante*, p. 88.)

**Q.**—State the evidence necessary to support an action brought by a plaintiff who sues an indorsee against the drawer of a bill of exchange, when everything is put in issue and required to be proved by the defendant's pleading.

**A.**—It will be necessary to prove (1) the drawing of the bill, (2) the indorsements, (3) due presentment for payment to the acceptor and his default, and (4) notice of dishonour: (see 2 Arch Nisi Prius, *et seq.*, 2nd edit.)

**Q.**—In an action upon a bill of exchange, brought by an indorsee against the acceptor, where the bill is drawn payable to the drawer's own order, and by him indorsed to the plaintiff, what evidence is necessary to enable the plaintiff to obtain a verdict, supposing the defendant to plead only that he did not accept the bill?

**A.**—The plaintiff need only prove the acceptance of the bill by the defendant.

**Q.**—State the evidence to be adduced on the trial of an action of trover.

**A.**—(1) That the plaintiff was in possession of the goods in question,



or had the right of property, and the right to immediate possession, (2) that the goods came into the possession of the defendant, (3) that he, or some person by his orders, converted them, and (4) the value of the goods: (1 Arch. Nisi Prius, 601, *et seq.*, 2nd edit.)

Q.—Under pleas of a right of way for twenty and forty years, under stat. 2 & 3 Will. 4, c. 71 (Lord Tenterden's Act), what facts are necessary to be proved besides the mere proof of user of the way for those periods?

A.—He must prove (1) the user by himself and servants "as of right," that is openly and not by stealth, for twenty or forty years next before the commencement of the action; (2) that the use of the way was continuous and without interruption for that time: (Arch. Nisi Prius, 348-350.)

Q.—What was the necessary evidence to support an action on an attorney's bill, when the pleas were "never indebted," and "no signed bill delivered?"

A.—(1) The retainer by the defendant, (2) that the work and business charged for were performed, and (3) that a signed bill thereof was delivered to the defendant, or left for him at his dwelling-house, or last place of abode, one month before the action was commenced. If the bill had not been taxed, it was usual to be prepared with evidence of the reasonableness of the charges: (see 1 Saund. Plea. and Ev. by Lush, 248 *et seq.*, 2nd edit.; Tay. Ev. 208, 209.)

Q.—Could an answer in Chancery be used in evidence at Nisi Prius against the party making it?

A.—Yes, as a cogent admission upon oath of the allegations which it contained (Tay. Ev. 479, 1152; Pow. Ev. 250, 251; *Goode v. Job*, 32 L. T. Rep. 88); but *demurrers* and *pleas* in equity were not so receivable, they being merely hypothetical statements, which, *assuming* the facts as alleged, denied that the defendant was bound to answer: (Tay. Ev. 1152.)

Q.—Assuming it to be necessary, in an action brought, to give in evidence letters patent under the great seal, and the probate of a will, in what mode is the proof to be established?

A.—The primary mode of proving letters patent will be by producing the original under the great seal (Tay. Ev. 1018); but they may also be proved by printed or manuscript copies, or by extracts, certified and sealed by the Commissioners of Patents, or other proper officers: (16 & 17 Vict. c. 115, s. 4; Pow. Ev. 280.)

The probate of a will may be proved primarily, either by producing the probate itself, or, if lost or destroyed, it *may* be proved by an examined or a certified copy of the entry in the Act-book: (14 & 15 Vict. c. 99, s. 14; Tay. Ev. 1049; Pow. Ev. 273.)

Q.—Give instances where the statements of persons not upon oath are admissible evidence of the facts stated, and instances where such statements would be inadmissible.

A.—Statements in writing made by a person *in the course of his business*, without any interest to misrepresent the truth, *if* contemporaneous with the fact, are evidence after his death of the fact: (*Price v. Tarring-*

ton, 1 Sm. L. C. 139, and notes.) And by the 32 & 33 Viet. c. 68, persons objecting to take an oath, or being objected to as incompetent to take an oath, may, as before shown, by leave of the presiding judge, give evidence on declaration; and see next answer.

**Q.**—In what cases may entries in the writing of a deceased person be given in evidence to prove the facts stated in them?

**A.**—If a person has peculiar means of knowing a fact, and makes an entry or declaration of that fact, which is against his interest, it is clearly evidence after his death, if he could have been examined as to it in his lifetime: (*Higham v. Ridgway*, 2 Sm. L. C. 183.) (a)

**Q.**—When the genuineness of handwriting is disputed, when and in what manner is a comparison of the disputed handwriting with another handwriting admissible?

**A.**—Comparison of a disputed handwriting with any writing proved to the satisfaction of the judge to be genuine, may be made by witnesses, and such writings, and the evidence of witnesses respecting them, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute: (17 & 18 Vict. c. 125, s. 27.)

**Q.**—Can parol evidence in any and what cases be admitted in contradiction or explanation of a written contract?

**A.**—It is a rule of law that parol testimony cannot be received to contradict, vary, add to, or subtract from the terms of a valid written instrument. But such evidence may, in all cases of doubt, be received to *explain* a written instrument—i.e. explain a *latent* ambiguity. Thus, if an estate be conveyed by the designation of Blackacre, parol evidence may be admitted to show what property is known by that name: (see Tay. Ev. 745 *et seq.*; Pow. Ev. pt. 11, chaps. vii., viii.) And it must of necessity be used in the interpretation of instruments written in a foreign language; in the case of ancient instruments; in cases where terms of art or science occur; in mercantile contracts, which in many instances are in a peculiar language employed by those who are conversant in trade and commerce, and in other instances in which the words, besides their general common meaning, have acquired another by custom: (Ohit. Cont. 103, 11th edit.)

**Q.**—In what cases will evidence of custom or usage be received to extend written contracts to matters on which they are silent?

**A.**—Evidence of any custom or usage will be received by which incidents not expressly mentioned in any contract are annexed to contracts of that description, unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract: (*Wigglesworth v. Dalison*, Sm. L. C.; Stephen's Dig. of Law of Evidence, 92.)

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(a) In this case, to prove the time of a birth, evidence was given that the surgeon who attended the birth was dead, and the books of the latter were offered in evidence. They contained an entry in the handwriting of the deceased of the circumstances of the birth, and the date; and opposite the charge for attendance was marked the word "paid." The books were allowed to be given in evidence, the entry being to the surgeon's prejudice: (see Pow. Ev. 112; 3 St. C. 564, 8th edit.; also *Price v. Torrington*, 1 Sm. L. C. 139.)

**Q.**—Plaintiff brings an action to enforce payment from defendant of 100*l.* and interest, which defendant, by indenture between plaintiff of the one part, and defendant of the other part, covenanted to pay, and which is overdue. Defendant pleads that the indenture is not his deed. What evidence must the plaintiff give at the trial to entitle him to a verdict ?

**A.**—This pleading operates as a denial of the execution of the deed in point of fact only ; and the plaintiff will only have to give such evidence as proves the execution : (see Ord. XIX., r. 20, and *ante*, p. 88.)

**Q.**—What are the requisites of proof in actions on contracts under seal ?

**A.**—(1) Proof of the execution of the deed ; (2) breach of the covenant by the defendant ; and (3) the damage sustained : (see 1 Arch. Nisi Prius, 365, *et seq.*, 2nd edit.)

**Q.**—Has a copyhold tenant of a manor a right to unqualified inspection of the court rolls and books of the manor ; and if so, before or pending action ?

**A.**—He has a right to an unqualified inspection of the court rolls and books of the manor, although no action be pending : (see Chit. Arch. 1173, 13th edit.)

**Q.**—On a plea of *nul tiel* record, how is a record in the same court to be proved ? and how is a record of another court to be proved ?

**A.**—If it be a record of the same court, the record itself must be produced. If of an inferior court a transcript of it must be produced under a writ of *certiorari* directed to the judge of the inferior court. But if it be a record of a superior court, then, as an inferior court cannot command a superior one, nor courts of equal degree one another, the record must first be brought into the High Court of Justice by *certiorari* ; and afterwards an exemplification of it, under the Lord Chancellor's seal is sent by *mittimus* to the court in which the action is pending : (1 Sm. Act, 119, 10th edit.)

**Q.**—If a deed or document, required for the purpose of the cause, be in the possession of the adverse party, what is the usual course to be pursued with a view to its production ; or, if not produced, to be enabled to give secondary evidence of its contents ?

**A.**—Give him or his solicitor notice to produce it ; and if when called upon at the trial he refuses to do so, then, upon proof of the notice and that the document is in the possession of the party, or his agent, &c., you may give secondary evidence of its contents : (see Chit. Arch. 293, 13th edit.) (a)

**Q.**—What is the object and effect of the notice to produce and admit usually given in an action.

**A.**—The notice to produce is given when documents required for the purposes of the cause are in the possession of the adverse party ; and if

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(a) But the court or judge may order the production of documents in the possession or power of any party, upon oath, if they relate to any question in the action : (Ord. XXXI., r. 12 *et seq.*)

on the trial he refuses to produce them, upon proof of the notice, and that the documents are in the possession of the adverse party or his agent, secondary evidence of their contents may be given. The notice to admit is given in respect of documents necessary to be proved at the trial, and without which the party would not be entitled to the expense of proving them; notice is given to the opposite party for him to inspect and admit the documents, and if not admitted, the costs of proving them will have to be paid by such party, unless at the trial the court certifies that the refusal to admit was reasonable: (Ord. XXXII., r. 2.) Any party may also by notice in writing at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit any facts mentioned in such notice, and refusal or neglect to admit, within six days involves payment of the costs of proof in any event, unless the judge or court at the trial certify refusal or neglect was reasonable, or a court or judge otherwise order or direct: (*Ib.*, r. 4.)

*Q.*—If you are in possession of a document which you intend to produce at the trial, would you be justified in incurring the expense of taking a witness to prove it; or is there any other way of avoiding the expense, and what is the consequence of not adopting it? (*a*)

*A.*—You should, in such case, give the opposite party notice to inspect and admit the document, and if not admitted, the cost of proving the document will have to be paid by such party, unless at the trial the court certifies that the refusal to admit was reasonable. No costs of proving such document will be allowed unless this notice be given, except in cases where the omission to give such notice is, in the opinion of the taxing master, a saving of expense: (Ord. XXXII., r. 2.)

*Q.*—If a party to a cause call a witness to prove the execution of a written instrument without first requiring the admission of its due execution, what will be the consequence of such omission?

*A.*—See preceding answer.

*Q.*—Does the rule of court, which requires a *notice to admit* written documents proposed to be adduced in evidence, apply to all documents, or to such only as are in the party's possession?

*A.*—It extends as well to documents in the hands of third parties, as to those in possession of the party requiring the admission; but the documents must be described accordingly: (Chit. Arch. 286, 13th edit.)

*Q.*—When a verdict has been set aside and a new trial directed, and, previously to the first trial, the usual notice to inspect and admit documents given and admission made, is it necessary to give fresh notice and to obtain a fresh admission of the same documents upon the second trial?

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(*a*) This and the next preceding question have been asked in the following form: What communication upon this documentary evidence should a solicitor have with the opposite party before going to trial, and what is the consequence of omitting to take the proper steps? This question may also be answered from the text: Explain the Law of Evidence as regards proving the contents of written documents in the respective cases of their being in the possession of yourself, your adversary, and a third person, and of their being lost.

**A.**—It is not; the notice given and the admission made on the first trial will be binding on the parties: (Chit. Arch. 322, 12th edit.)

**Q.**—Within what time must a party called upon by notice to admit documents either admit or refuse to admit?

**A.**—He must do so within forty-eight hours from the time he was called upon by notice to admit the documents: (see Form 11, Appendix B, to Rules of Court, 1883.)

**Q.**—When a document is admitted by the opposite party under the usual notice to admit, saving all just exceptions, give an instance when such document would not be receivable in evidence?

**A.**—By admitting a document the party does not thereby in any way recognise its legal validity, but merely enables the opposite party to dispense with the usual evidence which would otherwise be necessary to bring it before the court. Thus a party who admits his signature to a bill of exchange, or other document requiring a stamp, may still object to the want of, or insufficiency of the stamp: (Pow. Ev. 154, 155.)

**Q.**—In what cases is secondary evidence of documents admissible?

**A.**—When a party has done everything in his power to bring before the court primary evidence of his case, as by searching for documents in places where it was most reasonable to expect them to be deposited, or by giving an opposite party notice to produce them, he will then, and not till then, if he be unsuccessful in his exertions, be permitted by the court to give secondary evidence of such documents: (Pow. Ev. 302.)

**Q.**—How are the contents of written documents proved if the document is lost?

**A.**—By copies or other secondary evidence of their contents, on satisfactorily showing that you have done everything to find the originals: (Pow. Ev. 302, *et supra*.)

**Q.**—Are there any and what means by which the defendant in an action can ascertain and inspect documents in the plaintiff's possession?

**A.**—Either party, without affidavit, may obtain an order directing any other party to make discovery, on oath, of the documents which are or have been in his possession or power relating to any matter in question in the action, and whether he objects to their production, and if so, on what grounds; and if such party omits to give inspection, after due notice, an application for an order to inspect should be made to a judge: (Ord. XXXI, rr. 12, 13, and 18.)

**Q.**—It becomes necessary on the trial of an action to be prepared with evidence of entries in the books of a banker (not a party to the action). How can such evidence be procured and given? Is there any, and what, recent legislation on the subject?

**A.**—"The Bankers' Books Evidence Act, 1879" (42 Vict. c. 11) provides that a copy of any entry in a banker's book shall, in all legal proceedings, be received as *prima facie* evidence of such entry and of the matters, transactions, and accounts therein recorded (sect. 3), if the book at the time of making the entry be proved by a partner or officer of the bank to have been one of the ordinary books of the bank in its control or

custody, and the entry made in the usual and ordinary course of business (sect. 4), and that the copy has been examined with the original entry and is correct (sect. 5).

A banker or officer thereof cannot be compelled to produce a bank book or give evidence in any case in which the bank is not a party, unless by order of a judge made for special cause (sect. 6).

On the application of any party to a legal proceeding, a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book, without summoning the bank or any other party, to be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs (sect. 7); costs thereof to be in the discretion of the court or judge, who may order the same to be paid by the bank in the case of default or delay on its part (sect. 8).]

Proof that the bank makes its return to the Commissioners of Inland Revenue must be given (sect. 9).

*Q.*—After what lapse of time does a will or deed prove itself? (*a*)

*A.*—When it is thirty years old, or upwards, and comes out of the possession of a person entitled to its custody: (see *Pow. Ev.* 50, 224.) The thirty years are computed from the date of the instrument, even in case of a will: (*McKenire v. Fraser*, 9 Ves. 5; *Pow. Ev.* 275.)

*Q.*—In what case is it necessary to call an *attesting* witness in order to prove a document? What alteration has been recently made in the law on this subject?

*A.*—By the 17 & 18 Vict. c. 125, instruments, to the validity of which attestation is not necessary, may now be proved by admission or otherwise (*s.* 26): therefore, it is only necessary to call the attesting witness where attestation is necessary to give the instrument validity. Before this Act an attested document could not have been admitted, but the attesting witness must have been called to prove it: (*Pow. Ev.* 306, 307.)

*Q.*—What written instruments now require an attesting witness to make them valid?

*A.*—(1) Instruments which require an attesting witness by the express direction of some person or persons, as instruments executed under powers. (2) Instruments which require attestation by some Act of Parliament, as wills, warrants of attorney, cognovits, bills of sale, conveyances under the Mortmain Act, &c.: (see *Pow. Ev.* 306; 17 & 18 Vict. c. 125, *s.* 26, *Day's edit.*; 41 & 42 Vict. c. 31.)

*Q.*—When an attesting witness to the execution of a deed is dead, what proof is required of the execution of the deed?

*A.*—If the deed is not admitted, proof must be given of his handwriting and death: (see *Pow. Ev.* 306, 307.)

*Q.*—Under what circumstances may comparison of handwriting be made on the trial of a civil cause?

*A.*—The various admissible kinds of such proof are these: (1) Handwriting may be proved by a witness who actually saw the party write or

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(*a*) Also put thus: How do you prove at the trial a deed more than thirty years old?



sign. This is the most satisfactory evidence. (2) By a witness who has seen the party write on other occasions, even if it be but once only. (3) By a witness who has seen documents purporting to be written by the same party, and which, by subsequent communications with such party, he has reason to believe the authentic writings of such party. (4) Under the Procedure Act, 1854, s. 27, in civil cases, a witness may give his opinion as to the authenticity of a disputed document by comparing the handwriting with any document which has been proved to the satisfaction of the judge to be the genuine writing of the party: (see Pow. Ev. 304.)

**Q.**—If your client has an unstamped written agreement, and it is doubtful if it requires a stamp, and it has to be used as evidence at a trial at *Nisi Prius*, what advice would you give your client as to stamping it, and what is the latest time it could be stamped?

**A.**—As the time for stamping it would be past (within fourteen days of its date), I should advise him not to stamp it, as it could be given in evidence at the trial, if it required stamping, on paying the duty, penalty, and a further penalty of 1*l.* (a): (see 17 & 18 Vict. c. 125, ss. 28, 29; Pow. Ev. 357.)

**Q.**—A deed of gift and a will are both executed by the same person, and attested by the same witnesses. Is there any, and what difference in the necessary mode of proving the execution of the two instruments?

**A.**—A deed, unless attestation is necessary to its validity, may be proved, by admission or otherwise. As to a will, formerly the original will must always have been produced and proved by the attesting witnesses (Pow. Ev. 274, 306); but now, by the 20 & 21 Vict. c. 77, probate is *conclusive* evidence, if the will was proved in solemn form (s. 62), or *sufficient* evidence if the plaintiff has given the defendant ten days' notice before the trial that he intends to give such probate in evidence to establish any devise therein contained, unless the defendant within four days after receiving such notice, gives the plaintiff notice that he intends to dispute the validity of the devise: (sect. 64.) (b)

**Q.**—Suppose a witness whom you wished to call as a witness in a cause was about to sail on a distant voyage, should you think it advisable to detain him here till the trial, or is there any other way of obtaining his testimony?

**A.**—Yes; application may be made to the court, or at chambers, for a rule or order for the examination of the witness on oath before a master of the court, or other person named in such order. The application should be supported by affidavit, stating the name of the witness, and that he is material, and the grounds upon which you apply to

(a) If a deed and the stamp is over 10*l.*, interest at 5 per cent. not exceeding the duty is also payable.

(b) The party receiving the notice under the 64th section is not precluded from contesting the validity of the will at the trial, although he does not give a counter notice within four days, as this section only makes the probate "sufficient evidence," and was intended to prevent expense: (*Barraclough v. Greenhough*, L. Rep. 2 Q. B. 612.) It would seem that the notice should be served on the party, *sed quære*: (*Ibid.*)



have him examined; Chit. Arch, 302, 13th edit.)(a): (Ord. XXXVII, r. 5.)

Q.—Where a cause is at issue, and a material witness is so ill as to be unable to attend the trial, and there is danger of the evidence being lost, is any, and what, course open to the party requiring the evidence of the witness by which he can obtain the benefit of such evidence?

A.—Yes; a similar rule or order to that stated in the preceding answer may be obtained, and in a like manner. But there must, in addition to the usual affidavit, also be an affidavit of a surgeon or physician verifying the illness of the witness: (*Ib.*)(a)

Q.—An action is brought on a charter-party, the defendant's witnesses reside at Singapore; how can he procure their testimony?

A.—As Singapore is one of Her Majesty's dominions abroad, the defendant may apply to any division of the High Court for a writ in the nature of a *mandamus* to the tribunals there for the examination of the witness there, and upon the examination being returned, it will be allowed and read as evidence at the trial: (see 13 Geo. 3, c. 63, s. 44; 1 Will. 4, c. 22, s. 1.)

Q.—A. brings an action on a policy of insurance; his principal witnesses reside at Bordeaux and Dublin, and refuse to come over to be examined: can the plaintiff enforce their attendance, or how can he obtain their testimony?

A.—The plaintiff cannot compel witnesses residing at Bordeaux to come over to this country to be examined, but he may have a commission for their examination there, on oath, by interrogatories, or otherwise. The witnesses residing in Dublin may, by leave of the court or a judge when the court is not sitting, be compelled, by subpoena, to attend in this country for the purpose of obtaining their testimony; the application must be supported by affidavit showing that the witnesses are material: (see 17 & 18 Vict. c. 34; *Smith v. M'Guire*, 31 L. Rep. 119.)

Q.—If a witness do not attend upon his subpoena, can he be proceeded against; and, if so, in what way?

A.—The usual remedy against a witness for non-attendance at the trial is by attachment or by action. To entitle a party to any of these remedies, the witness must have been personally served with a copy of the subpoena, and the original at the same time shown to him: his necessary expenses must also be paid or tendered to him, and the affidavit must state that he was a material witness: (Sm. Act. 135, 2nd edit., by Foulkes.)

Q.—A solicitor preparing a brief calls on a witness to subpoena him, but, not finding him at home, leaves a copy of the subpoena for him with his wife. Is this sufficient?

A.—No. See preceding answer.

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(a) But in the above case the depositions taken cannot be read as evidence at any trial without the consent of the parties against whom the same may be offered, unless the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial: (see Order XXXVII. *Beaufort (Duke of) v. Crawshay*, 14 L. T. Rep. N. S. 729.)

**Q.**—How many witnesses can be included in a common subpoena?

**A.**—Three only can be included in a *subpœna duces tecum*; in other cases any number may be included: Ord. XXXVII., rr. 29, 30.)

**Q.**—By what process can the attendance of witnesses at a trial be enforced? Is there any, and what, difference in the process where the witness is required to produce documents?

**A.**—By *subpœna ad testificandum* where only *rivâ voce* evidence is required, but by *subpœna duces tecum* where witness is required to produce documents as evidence, copies of which writs must be served a reasonable time before the trial on the intended witnesses, and their necessary expenses at the same time tendered to them: (Chit. Arch. 320-322, 13th edit.)

**Q.**—If a witness is in custody, how is his evidence obtained?

**A.**—He should, if in custody on civil process, be brought up on *habeas corpus ad testificandum*, which is granted by a judge at chambers. If otherwise a prisoner, a warrant or order for this purpose must be obtained from one of the principal Secretaries of State or a judge at chambers: (Chit. Arch. 326, 13th edit.)

**Q.**—If a witnessed subpoenaed to attend the assizes is arrested on civil process on his way to the assizes, what course should he pursue to be relieved?

**A.**—The witness may apply to the judge at Nisi Prius, or to the court out of which the process of arrest issued, or the court where the cause in which he is to give evidence is pending, or to a judge at chambers, for a *habeas corpus* to be discharged: (Chit. Arch. 687, 13th edit.)

**Q.**—How are you to enforce the attendance of witnesses before a referee, or on commissions?

**A.**—Under a reference under the Judicature Acts, subject to any order of the court or judge, the attendance of witnesses may be enforced by subpoena: (Ord. XXXVI., r. 49.)

The attendance of witnesses on a commission is enforced by rule or order, and notice of the time and place of examination signed by the examiner, the wilfully disobeying which is a contempt of court: (see Tay. Ev. 845, 846.) See 6 & 7 Vict. c. 82, ss. 5, 6, as to the mode of compelling the attendance of witnesses when the commission is to be executed out of the jurisdiction.

**Q.**—What is the proper course for a person who has been subpoenaed as a witness to take, in order to secure payment of his expenses?

**A.**—He may refuse to attend until his proper expenses are paid, and, previously to being sworn, he may refuse to give evidence at the trial. A witness may also maintain an action for his expenses against the party on whose behalf he was subpoenaed: (Chit. Arch. 323, 13th edit.)

**Q.**—If a person who is required by a party to the cause to make an affidavit refuse to do so, by what mode may he be compelled to give evidence as to the matter concerning which he has refused to make an affidavit?

**A.**—The party requiring the affidavit may apply by summons for an

order to such person to appear and be examined upon oath before a judge or master, as to the matters concerning which he refuses to make an affidavit; and the judge may, if he think fit, order such person to attend for the purpose of being examined, and to produce any documents mentioned in the order : Ord. XXXVII.

*Q.*—What are the principal provisions of the new rules with reference to discovery, inspection, and interrogatories ?

*A.*—In any action where relief by way of damages or otherwise is sought on the ground of fraud or breach of trust, and in other cases by leave, the plaintiff at or after delivering his statement of claim, and the defendant at or after delivering his defence, may deliver interrogatories : (Order XXXI., r. 1.)

Applications to strike out same must be made within seven days of service : (r. 7.)

They must be answered by affidavit within ten days, unless otherwise ordered : (r. 8.)

If affidavit exceeds ten folios it must be printed : (r. 9.)

In default, order must be obtained requiring the party to answer, or to put in further answer : (r. 11.)

Production of documents on oath may be ordered at any time by court or judge : (r. 14.)

Discovery of documents may be applied for by either party without affidavit : (r. 12.)

Either party may give notice to produce any document referred to in opposite party's pleadings. In default it cannot be given in evidence without leave : (r. 15.)

And within two days of such notice, or four days if documents are not in party's possession, he must give notice stating when within three days documents will be produced at his solicitor's : (r. 17.)

In default judge may order inspection : (r. 18.)

Any one or more answers to interrogatories may be given in evidence at the trial, but judge may order all to be put in : (r. 24.)

*Q.*—State the necessary steps to be taken in order to obtain a view by the jury. How and by whom is such view conducted ?

*A.*—Either party is at liberty to apply to the court or a judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute, and in some cases concerning lands and messuages, the officer of the court will, on application, draw up a rule for a view. Two persons will be appointed as showmen and six jurymen selected as viewers, and the sheriff will return their names to the associate for the purpose of being called at the trial : (Sm. Act. p. 142, 11th edit. ; *vide* C. L. P. Act, 1852, ss. 114, 115, and R. G., H. T. 1853, Rules 44-49.) Orders for inspection should now be made under Ord. L., rr. 3-5 : (*Pickard v. Great Northern Railway Company, Law Times, 24th Nov., 1883.*)

*Q.*—A plaintiff or defendant, prior to the trial of a cause, wishes to ascertain facts which he believes to be in the knowledge of the opposite party; what proceedings should he adopt to do so ?

A.—The plaintiff, at or after the time of delivering his statement of claim, and the defendant, with or after his defence, without order in case of fraud or breach of trust, and in other cases by leave of the court or a judge, may deliver interrogatories for the examination of the opposite party or parties, or any one or more of them. But only one set can be delivered to the same party without order: (Ord. XXXI., r. 1.)

The affidavit in answer must be filed within ten days: (Ord. XXXI., r. 8.) But any objection to answering on the ground that it is scandalous or irrelevant, or not *bonâ fide* for the purpose of the action, or that the matters are not sufficiently material at that stage of the action, or on any other ground, may be taken in the affidavit: (*Ib.*, r. 5.) An application to set aside the interrogatories on the ground that they have been exhibited unreasonably or vexatiously, or to strike out same on the ground of being prolix, oppressive, unnecessary, or scandalous, may be made at chambers within seven days of service: (*Ib.*)(a) An interrogatory may be left unanswered if the objection be one of law; *secus* if one of fact: (*Smith v. Berry and wife*, 36 L. T. Rep. 471.)

Q.—Where a party fails to comply with an order to answer interrogatories, or for discovery of documents, what remedies has the opposite party? Distinguishing the cases where the party in default is plaintiff or defendant.

A.—If any party fails to comply with an order to answer interrogatories, or for discovery or inspection of documents, he is liable to attachment. He is also, if a plaintiff, liable to have his action dismissed for want of prosecution; and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended; and the party interrogating may apply to the court or a judge for an order to that effect, and an order may be made accordingly: (Ord. XXXI., r. 21.)

Q.—For what purpose may interrogatories be administered by either party?

A.—For the purpose of eliciting all such facts material to the questions in dispute in the action, as the party interrogated is not privileged from disclosing.

Q.—In an action of libel (as, for instance, a libel published in a newspaper), state generally what are the leading points that require to be proved.

A.—The plaintiff will have to prove (1) the publication of the libel, and that it is false; (2) the malice of the defendant; and, if special damage has been sustained, (3) the amount of the damage: (see Arch. Nisi Prius, 442 *et seq.*)

Q.—What are the principal provisions of the 2nd section of the statute 6 & 7 Vict. c. 96, which enables a defendant in an action for a libel contained in a public newspaper to avail himself of an apology being made? How and when must such an apology be made? And what, in

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(a) It has been held that interrogatories may be delivered under an interpleader issue: (*White v. White*, 6 L. T. Rep. N. S. 387; and see hereon *Meadows v. Kirkman*, 2 L. T. Rep. N. S. 251; *Bartlett v. Lewis*, 6 L. T. Rep. N. S. 888.)

addition to such apology, must be done by the defendant to constitute a defence under that statute?

A.—Under this section a defendant may plead that the libel was inserted without malice or gross negligence, that before the commencement of the action, or at the earliest opportunity afterwards, he inserted a full apology for it in such newspaper; or, if the newspaper or periodical in which the libel appeared is ordinarily published at intervals exceeding one week, that he had offered to publish the apology in any paper selected by the plaintiff in the action. In addition to the above the defendant must, with his pleading, pay something into court.

Q.—In actions of libel or slander, what is the meaning of the communications being privileged? Give some instances of privileged communications.

A.—The meaning of the communication being privileged in libel and slander is, that it cannot be received as evidence of the libel or slander; it rebuts the *prima facie* inference of malice: (*Owens v. Roberts*, 29 L. T. Rep. 39.)

As when a master, acting *bond fide*, libels a servant in giving a character to such servant. In fact, the rule of law is, that if a person who has an interest or duty in reference to the subject-matter of the libel publishes a statement to a person who has a duty in reference to the same subject-matter, or publishes to a person whom he believes has a moral duty, that communication is privileged, and the occasion rebuts the inference of malice: (*Harrison v. Bush*, 5 Ell. & Bl. 344.) See also 44 & 45 Vict. c. 60, s. 2, as to privilege of newspaper reports.

Q.—Is a *bond fide* report of a debate in Parliament, and are *bond fide* comments made by the press on the report, privileged? What is the leading case on the subject?

A.—A faithful report of a debate in Parliament is privileged, and so are comments thereon by the press, if made in an honest and fair spirit. The leading case is *Wason v. Walter* (L. Rep. 4 Q. B. 73).

## TRIAL AND PROCEEDINGS TO JUDGMENT.

Question.—What is the derivation and meaning of the term “*Nisi Prius*,” as applied to the courts holden for the trial of causes in the superior courts of Westminster Hall?

Answer.—There was a sort of real action called an *assize* (now abolished), which was tried in the very county in which the land in question lay, by judges called *justices of assize*. The statute of *Nisi Prius* (13 Edw. 1, c. 30) therefore enacted that these justices should try other issues, return the *verdicts* into the court above, and, in order to enable them to do so, the writ of *venire* (also abolished) was altered, and instead of ordering the sheriff to bring the jurors *to the court at Westminster*, he was ordered to do so on a certain day *Nisi Prius*, i.e., *unless before that day the justices of assize came into the county*, for then the statute rendered it his duty to return the jury, not to the court, but to the justices of assize. Hence it is that judges are said to sit at *Nisi Prius*, and trials

to take place at the assizes : (Sm. Act. edit. by Foulkes, 184.) By sect. 16 of the Judicature Act, 1873, the jurisdiction of the courts, created by Commissioners of Assize, is transferred to the High Court of Justice.

**Q.**—Who are the proper parties to decide questions of fact in actions brought in the High Court of Justice, and who are the proper parties to decide questions of law in the same court ?

**A.**—When the case is heard before a jury questions of fact are decided by them ; but the presiding judge explains to them the questions which require their determination, and decides or reserves points of law arising on the trial, but an action may be tried before a judge or judges or before a judge sitting with assessors, or before an official or special referee with or without assessors : (Ord. XXXVI., r. 7a.) A case, or points in a case, reserved at the trial is argued before a divisional court of the High Court : (Judicature Act, 1873, s. 46.)

**Q.**—When is a cause now heard before a jury ?

**A.**—By Order XXXVI., r. 2, in actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise, either party can claim a jury.

By rule 3 causes or matters assigned by the principal Act to the Chancery Division are tried by a judge without a jury, unless otherwise ordered.

By rule 4 the court or a judge, if it appear desirable, may direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which, previously to the passing of the principal Act, could without consent of parties have been tried without a jury.

So, by rule 5, of any cause, matter, or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigations, which cannot be conveniently made with a jury.

By rule 6, in any other cause or matter, on application of either party, an order will be made for trial with a jury. In all other cases it will be ordered to be tried by a judge without a jury : (*Ib.*, r. 7, (a).)

When entitled to a jury, either party may give notice for a special jury : (*Ib.*, r. 7, (b), (c).)

**Q.**—If points of law arise at *Nisi Prius*, and are reserved by the judge, state the usual steps by which they are subsequently disposed of.

**A.**—The solicitor bespeaks a copy of the judge's notes made at the trial, sets down the action on motion for judgment and gives notice thereof to the other parties. The point is argued on the motion, and decided by the court, which is usually placed in the same condition as the judge was before whom the point arose : (see Ord. XL., r. 2.)

**Q.**—What is the meaning of "withdrawing a juror," and what effect has it ?

**A.**—When neither party feels sufficient confidence to persevere till verdict, the judge at the trial frequently recommends the parties to withdraw a juror. If the parties consent, a juror is withdrawn from his fellows, and the rest are discharged. It seems this puts an end to the action ; and if the plaintiff afterwards continue it, or commence another for the same cause, the court, upon application, will stay the proceeding. But if,



instead of moving to stay the second action, the defendant allow it to proceed, it will be no objection at the trial: (Chit. Arch. 376, 13th edit.; Sm. Act. 147, 2nd edit. by Foulkes.)

**Q.**—In actions upon contracts for damages. &c., where some of the defendants let judgment go by default and others plead, and upon the trial the verdict is found for one or all of the defendants who pleaded, would the jury proceed to assess damages against the defendants who suffered judgment to go by default, or what would be the result?

**A.**—In such a case the plaintiff could not formerly assess damages or obtain final judgment against those who had allowed judgment to go by default (see Arch. New Pract. 64, 65, 2nd edit.), as he must still have proved the joint liability of *all* the defendants at the trial (see *Boyles v. Webster*, 21 L. J. N. S. 202); but now damages against the defaulting defendant will be assessed at the same time with the trial of the action or issues therein against the other defendants, unless otherwise directed: (Ord. XXVII, r. 5.)

**Q.**—Explain the difference between a verdict and a judgment.

**A.**—A verdict is the unanimous decision of the jury on the point or issue submitted to them. It is either *general* for the plaintiff or defendant, or *special*, stating all the facts of the case, and leaving it to the court to pronounce the proper judgment: (see Holth. L. D. 2nd edit.) Judgment is the sentence of the law upon the matter appearing from the previous proceedings in the suit.

**Q.**—Is there any difference in effect of the plaintiff being nonsuited, and a verdict for the defendant?

**A.**—Formerly in case of nonsuit the plaintiff might bring a fresh action which he could not in case of verdict; but now, unless otherwise directed, a nonsuit has the same effect as a judgment for the defendant, but in case of mistake, surprise, or accident, it may be set aside upon terms: (Ord. XLI, r. 6, 1875.) As there is no provision in the new rules as to this, by Ord. LXXII, r. 2, the present procedure and practice remain in force.

**Q.**—To a statement of claim claiming 100*l.* defendant pleads: First, except as to 30*l.* never indebted; second, as to 30*l.* payment into court in satisfaction. The plaintiff joins issue on the first plea, and takes the 30*l.* out of court in satisfaction of so much of the claim. At the trial the plaintiff fails to prove any debt due beyond the 30*l.* For whom should the judgment be entered, and to what costs will each party be entitled?

**A.**—If the judge does not at the trial order judgment to be entered for the defendant, he should apply by motion for judgment, for he has the verdict: (Chit. Arch. 382, 13th edit.) The plaintiff was formerly entitled to costs up to instructions for plea, but now these would be in the discretion of the court. If the cause is tried by jury, the defendant is entitled to the subsequent costs unless the court otherwise orders.

**Q.**—If evidence, legally inadmissible, be received on a trial, what remedy has the party injured thereby?

**A.**—If the reception of the evidence was objected to by the counsel for the opposite party, the court will grant a new trial if asked for.



**Q.**—What is the law as to granting a new trial by reason of the ruling of a judge as to the necessity of a stamp or the sufficiency of a stamp on any document?

**A.**—By Order XXXIX., r. 8, it is provided that no new trial shall be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that it does not require a stamp.

**Q.**—State generally some of the cases in which the court will grant a new trial; and mention in actions for the recovery of debts what is the amount recovered under which a common motion for a new trial is prohibited.

**A.**—New trials are granted for misdirection by the judge to the jury in point of law, or for the improper rejection or admission of evidence by the judge, if substantial wrong or miscarriage is thereby occasioned; where the verdict is against evidence; for default in the jurors; for smallness of damages, or for excessive damages. If the amount recovered, however, is under twenty pounds, the court will seldom grant a new trial, unless for fraud or misdirection, or malpractice, or unless the action is brought to try some right. The court may now grant a new trial as to part only of the matter, or as to some only of the parties: (see Arch. New Pr. 481-497, 2nd edit.; see Ord. XXXIX., r. 6.)

**Q.**—What is the judicial interpretation of the phrase “against the weight of evidence”?

**A.**—The evidence must have been such that undoubtedly the jury ought to have come to a different conclusion, and that they are so manifestly and clearly wrong that there has been, in fact, a miscarriage of justice: (*Jenkins v. Morris*, 14 Ch. Div. 684; *Joyce v. Metropolitan Board of Works*, 44 L. T. Rep. 811.)

**Q.**—Within what time after verdict or nonsuit must application be made for a new trial?

**A.**—If the trial has taken place in London or Middlesex, an eight days’ notice of motion must be served within eight days after the trial; if elsewhere, within seven days after the then circuit sittings, vacation not to be reckoned. The application must be made to the Court of Appeal, if the case had been tried by a judge without jury: (Ord. XXXIX., r. 4.)

**Q.**—Is there any appeal from a judgment of a divisional court on an application for a new trial, or on motion for judgment?

**A.**—There is an appeal to the Court of Appeal from any judgment or order of the High Court, or of any judge or judges thereof, save as in the Act mentioned: (a) (1873 Act, s. 19.)

**Q.**—When a plaintiff has proceeded to trial and has obtained a verdict, which is afterwards set aside and a new trial obtained, and the plaintiff

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(a) Judicature Act, 1873, s. 45. The judgment of a divisional court upon an appeal from an inferior court is to be final, unless leave to appeal be given. By sect. 47 the judgment of the Court for Crown Cases Reserved is final. By sect. 49, no appeal lies except with leave from any judgment or order made by consent or as to costs only which by law are left to the discretion of the court. By sect. 50, an appeal does not lie direct to the Court of Appeal from an order made at chambers without leave

does not give fresh notice, what steps should the defendant take to terminate the cause ?

*A.*—There is no mode of compelling the plaintiff to proceed to trial ; but the defendant, if he will, may take the cause down to trial by proviso, or if the rule were granted to either party on payment of costs, and he has not paid them, the other party may move to discharge it : (see *Chit. Arch.* 1501, 12th edit. ; *Oakley v. Ooddeen*, 2 L. T. Rep. N. S. 432.)

*Q.*—Where a plaintiff takes a record down for trial at the assizes, but the cause goes over by reason of the judge not reaching it, or not being able to try it, can the defendant give the plaintiff notice to proceed ? If not, what remedy has he to make an end of the cause ?

*A.*—The defendant cannot give the plaintiff notice to proceed in this case, for the plaintiff is not in fault : (12 Jur. 520.) And the defendant has no remedy, but must wait until the cause be called on and tried : (*Ham v. Greg*, 6 B. & C. 125 ; *Chit. Arch.* 1500, 12th edit.)

## JUDGMENT.

*Question.*—State the different kinds of judgments.

*Answer.*—Judgments are either *interlocutory* or *final* : (see *Sm. Act.* 179, 10th edit.)

*Q.*—What is the difference between interlocutory and final judgment ?

*A.*—An interlocutory judgment is one given *in the course* of the action, and does not terminate it. Thus, if the defendant suffers judgment by default or confession, and the demand sued for be unliquidated damages, the judgment given is interlocutory, because the court knows not what damages the plaintiff has sustained, which must be ascertained as stated *infra*. A final judgment puts an end to the action : (see *Sm. Act.* 167, 2nd edit. by Foulkes.)

*Q.*—Must there be both sorts of judgments in all cases ?

*A.*—No ; where the amount sued for is liquidated, judgment by default or on confession, &c., is final. So if the amount sued for be damages, yet if the cause goes to trial and a verdict pass for the plaintiff, the jury would then assess the amount of damages, for which final judgment may be signed : (see *Chit. Arch.* 790, &c., 13th edit.)

*Q.*—Interlocutory judgment is signed on a claim for unliquidated damages ; what is the course of proceeding ?

*A.*—The plaintiff must first get the damages assessed before the sheriff on a writ of inquiry, then sign final judgment for the amount assessed. But the court or a judge may order that the damages be ascertained in any way in which any question arising in an action may be tried : (*Ord. XXVII.*, r. 4.)

*Q.*—What is a writ of inquiry, and when directed, and how obtained ?

*A.*—It is a writ directed to the sheriff, commanding him to summon a jury and inquire into the amount of damages due from the defendant to the plaintiff in an action. This writ is necessary where the judgment is

interlocutory, and the damage sustained cannot be ascertained by the master, and no other way is specially ordered. It is engrossed on parchment, sealed and indorsed, and left with the sheriff's deputy. The sheriff, in the execution of the writ, sits by deputy, and, when the damages are assessed, the inquisition is returned to the court above, and final judgment signed: (Chit. Arch. 807, 13th edit.; Sm. Act. 154, 2nd edit. by Foulkes.)

**Q.**—When the damages are to be assessed by the master, what steps are to be taken to obtain the inquiry?

**A.**—Although the application may be made to the court, in practice it is usually made to a judge at chambers on summons. After the order is made and served, the plaintiff's solicitor obtains an appointment with the master, and serves it on the defendant's solicitor. Each party then attends before the master with his witnesses (if any) and the master, after hearing the evidence, assesses the damages: (Ord. XXXVI., r. 57; *Ettison v. Evans*, 21 L. J. 317, Q. B.)

**Q.**—When action in debt is brought upon a bond in a penalty conditioned for the performance of covenants, or for the faithful conduct of a party, and the defendant does not plead, but suffers judgment by default, what steps, if any, should be taken by the plaintiff before the execution can be issued under the judgment? (a)

**A.**—The plaintiff should assign breaches, and proceed to get the damages assessed thereon under a writ of inquiry. The judgment is entered up for the amount of the penalty, yet the plaintiff can only issue execution for the amount of the damages sustained, assessed as above mentioned: (see 8 & 9 Will. 3, c. 11, s. 8; Chit. Arch. 817, &c., 13th edit.)

**Q.**—In what class of actions can a plaintiff obtain under the Judicature Acts speedy judgment (where the defendant has appeared) without the delay of a trial, and what steps should he take in order to do so; and how can the defendant defeat such steps?

**A.**—When the writ is specially indorsed under Order III., r. 6, plaintiff on affidavit by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount claimed (if any), and stating that in his belief there is no defence to the action, may apply to a judge for liberty to enter final judgment for the amount indorsed, which the judge may order, unless the defendant satisfies him that he has a good defence on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend: (see Ord. XIV., r. 1.)

**Q.**—When an action is brought upon a writ specially indorsed to recover 100*l.* with interest, and between the issuing of the writ and judgment the defendant pays 50*l.*, for what amount should judgment be signed?

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(a) Also put thus: A banker, on taking a clerk into his employment, requires him to find security, by bond, for his faithful conduct. A. enters into a bond in the penalty of 500*l.*, conditional for the faithful conduct of the clerk in the banker's service; the clerk misapplies money, and the banker sues A. upon the bond; A. lets judgment go by default. Can the plaintiff under such judgment at once issue execution, or must he take any, and what, previous steps?

**A.**—Judgment may be either entered up for the balance or for the full amount claimed; but in the latter case execution should only issue for the amount really due.

**Q.**—How soon may a successful party enter up judgment after trial in or out of term, and how can that time be shortened or enlarged?

**A.**—When the judge directs judgment to be entered for either party at or after the trial, judgment may be signed and execution issued at once, unless otherwise ordered; but the judge may at the trial adjourn the case for further consideration or leave any party to move for judgment: (*a*) (Ord. XXXVI., r. 39.) So if the defendant wishes to stay judgment, &c., and move for a new trial, &c., he may apply to the judge or sheriff at the trial, or to a judge at chambers on summons for this purpose: (see Chit. Arch. 1112, 13th edit.; Sm. Act. 157, 2nd edit. by Foulkes.)

**Q.**—What were the proceedings under the Common Law Procedure Act, 1852, in lieu of judgment, as in case of a nonsuit?

**A.**—Where the plaintiff neglected to bring the issue on to be tried within the proper time, the defendant might give him twenty days' notice to do so at the sittings or assizes (as the case might be) next after the expiration of such notice, and if the plaintiff made default the defendant might suggest that on the record, and sign judgment for his costs: (see 15 & 16 Vict. c. 76, s. 101.) (*b*)

**Q.**—What is the effect of the death of a sole plaintiff or defendant after trial and before judgment?

**A.**—The death of either party between the verdict or the finding of the issues of fact and the judgment is no abatement of the action, and the judgment may, in such case, be entered notwithstanding the death: (Ord. XVII., r. 1.)

**Q.**—State the effect of the bankruptcy of either plaintiff or defendant upon a suit.

**A.**—The bankruptcy of the plaintiff in any action which the trustee might maintain for the benefit of the creditors cannot be pleaded in defence unless the trustee decline to continue and give security for the costs thereof within such time as the judge may order. If the trustee continue, he must obtain an order, as stated in the last answer.

On the other hand, where the defendant becomes bankrupt, the Court of Bankruptcy may, after petition presented, restrain actions, &c., for debts provable under the bankruptcy, or allow them to proceed upon terms; and if the bankrupt obtains his order of discharge, of course it may be pleaded in bar (46 & 47 Vict. c. 52, ss. 10, 30); and this right

(*a*) The plaintiff may set down the action on motion for judgment within ten days after the trial: after that any party can do so within a year after becoming entitled so to do: (Ord. XL., rr. 2 and 9.)

(*b*) But the defendant may now give notice of trial, or move to dismiss for want of prosecution, if the plaintiff omits to do so within six weeks after the close of the pleadings, or within such extended time as a court or judge may allow: (Ord. XXXVI., r. 12.) And if the plaintiff omit to enter the action for trial in London or Middlesex by the day after giving notice, the defendant within four days may do so: (*Ib.*, r. 20.) In country cases either party may enter the action for trial: (*Ib.*, r. 22.)

to restrain has not been varied by the new Acts : (see *Re Alexander Collie and Company* ; Charley's Pract. Cas., p. 71.)

**Q.**—In what cases was the registration of a judgment necessary, and what advantages attended the doing so, and how was the same registered ?

**A.**—All judgments entered up *before* the 29th July, 1864, (a) must, to bind lands in the hands of purchasers and mortgagees, have been registered ; and if between July, 1860, and that date, a writ of execution must also have been issued, registered, and executed within three months from its registration, and re-registration every five years is required. The judgment was registered by leaving a memorandum containing the name, abode, and description of the debtor, the amount of the debt, &c., and other particulars, with the senior master of the Common Pleas : (see 1 & 2 Vict. c. 110 ; 23 & 24 Vict. c. 38 ; 27 & 28 Vict. c. 112.)

**Q.**—A person against whom judgment has been obtained in an English court resides in Ireland or Scotland. Are there any, and what, means of enforcing the judgment against him there ?

**A.**—Yes ; the judgment may be registered in the Irish or Scotch court, and it will then have the effect of a judgment of the court in which it is registered, and may be enforced accordingly : (31 & 32 Vict. c. 54, ss. 1 and 2.)

**Q.**—Suppose an action in debt on a money bond to secure one sum of money payable at one time, and a similar action to recover a sum payable by instalments, and a similar action for non-performance of covenants, and judgment by default obtained in each action, is there any, and what, difference in the steps to be taken before the plaintiff can issue execution ?

**A.**—In actions in debt on bond, to secure a gross sum of money payable at one time, the plaintiff may issue execution on the judgment by default, without taking any primary steps. But in actions on a bond conditioned for payment of money by instalments (b) or for non-performance of covenants, the plaintiff must first assign breaches, and proceed to get his damages assessed by writ of inquiry (unless otherwise ordered) before he can issue execution. The subject is governed by stat. 8 & 9 Will. 3, c. 11, s. 8, as stated *ante*, p. 122.)

**Q.**—When two or more persons are joined as plaintiffs in an action, and one of them only has a right to recover, state what course may be adopted in respect of judgment and costs.

**A.**—The misjoinder of parties is not now fatal ; but the court or a judge may order any of them to be struck out at any time on such terms as are just : (Ord. XVI, r. 11.) (c)

**Q.**—In how short a period can judgment be obtained when all the proceedings are by default ? and what is necessary to enable the plaintiff to sign judgment ?

(a) As to judgments entered up after the above date, see *post*, Div. Conv. tit. "Charge by Judgment."

(b) The following question is answered by the above : Is a judgment on a money bond interlocutory or final ?

(c) So any necessary parties may be added, but if plaintiffs only with their consent : (*Ib.*)

A.—If the writ is specially indorsed under Ord. III., r. 6, in default of appearance, the plaintiff may, on filing an affidavit of service or of notice in lieu of service, sign final judgment, and issue execution at once: (Ord. XIII., rr. 2 and 3.) If the writ is not specially indorsed, but the claim is for a debt or liquidated demand only, and the defendant does not appear, the plaintiff may, on filing a proper affidavit of service or notice in lieu of service, and a statement of claim, enter final judgment at the expiration of ten days for the amount (not exceeding the sum indorsed upon the writ) with costs to be taxed: (*Ib.*, r. 12; Ord. XXVII., r. 2.) If the claim is for detention of goods or damages, plaintiff signs interlocutory judgment and issues writ of inquiry to assess value of the goods or damages, unless otherwise ordered to be assessed: (*Ib.* r. 5.)

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### COSTS.

*Question.*—What is the meaning of “*Costs in the cause*,” and of “*Costs in any event*?”

*Answer.*—Costs in the cause are those which are properly incurred, and which are usually awarded to the successful litigant in the cause. Costs in any event are costs given on some interlocutory application to which the party is entitled, whatever may be the result of the cause: (Pat. & Mac. Pr. 470, &c.)

*Q.*—Explain the distinction of “costs as between attorney and client,” and “costs as between party and party.”

*A.*—In taxing costs as between “attorney and client,” the taxing officer allows all reasonable professional charges, whether for attendance, advice, or otherwise, incident or properly auxiliary to the subject-matter.

In taxing costs as between “party and party,” only those charges are allowed as, in the opinion of the taxing officer, were not only reasonable, but strictly *necessary*.

*Q.*—What is the meaning of double costs?

*A.*—The mode of computing double costs is thus: First, the amount of the single costs, including the expenses of witnesses, counsel’s fees, &c., is ascertained; and then one-half of that amount is added to it, and the two sums constitute what are called double costs. The stat. 5 & 6 Vict. c. 97, however, takes away the right to double costs in most cases, and in lieu thereof costs between party and party are to be recovered, and no more: (Chit. Arch. 429, 13th edit.)

*Q.*—How is the right to costs in an action now determined—

1. When it is tried by a judge without a jury?
2. When it is tried by a judge and jury?

*A.*—These costs are now in the discretion of the court, but when any action or issue is tried with a jury the costs follow the event, unless the judge who tried the case, or the court, for good cause, otherwise orders: (Ord. LXV., r. 1.) (*a*)

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(*a*) A judge at chambers cannot make the order: (*Baker v. Oakes*, 46 L. J. 246.)



**Q.**—State the principal alteration in the law as to costs made by the Judicature Acts and Rules.

**A.**—The principal alteration, as above stated, is that which gives the Supreme Court a general discretionary power as to costs; in equity it has always been so, but common law costs were, as a general rule, given to the successful party by virtue of a series of statutes commencing with the Statute of Gloucester (6 Edw. 1, c. 1), which first gave costs *eo nomine* to a plaintiff recovering damages. But nothing contained in the Act or Rules shall deprive an executor, administrator, trustee, or mortgagee, who has not acted unreasonably, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted on in the Chancery Division: (Ord. LXV., r. 1.)

**Q.**—In what cases may you compel a plaintiff to give security for costs, and when must the application be made?

**A.**—Where the plaintiff is permanently resident abroad, even although he be king of a foreign state, security will be ordered; but not when he is abroad for a temporary purpose, or by compulsion, as in the case of naval and military officers: (Sm. Act, 107, 2nd edit. by Foulkes.) And when the plaintiff sues for the benefit of third parties, he will generally be ordered to give security, as where he has assigned his property in trust for creditors: (see Chit. Arch., 13th edit., p. 1142.) So in suing for a penalty under the Merchandise Marks Act (25 & 26 Vict. c. 88, s. 24); and in actions by a limited joint-stock company without sufficient assets: (25 & 26 Vict. c. 89, s. 69.) As to giving security for costs under the 30 & 31 Vict. c. 142, see *post*, p. 128. Also in an action to redeem under 44 & 45 Vict. c. 41, s. 25, the security now will be of such amount, and be given in such times and in such manner and form as the court or judge may direct: (Ord. LXV., r. 6.) (a)

**Q.**—Can a plaintiff resident in Scotland or Ireland be required to give security for costs? State reasons.

**A.**—No, unless on special grounds a court or judge shall otherwise order: (31 & 32 Vict. c. 54, s. 5.)

**Q.**—A. sues B. and C. in trespass, verdict is against B. and for C. What costs is A. entitled to; and is C. entitled to any costs?

**A.**—If there is no jury the costs are in the discretion of the court; but if there is a jury, unless the court or judge otherwise order, A. will be entitled to his costs against B., deducting any extra costs that have been occasioned by making C. a party; and C. will be entitled to his reasonable costs against A., unless the judge certifies to deprive him of them. If B. and C. defended jointly, C. is only entitled to a half of the costs; but if they *bonâ fide* defended by separate solicitors, he will be entitled to the whole of his costs: (Chit. Arch. 427, 13th edit.)

**Q.**—Has the judge the power to deprive a successful litigant of his costs?

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(a) The application formerly in ordinary cases was made before issue joined. After issue joined it must have been shown that the facts on which the defendant relied had just come to his knowledge, and that no step had been taken by him in the cause subsequently to such knowledge: (R. G. 22.)



A.—Yes, the costs being in every case in the discretion of the court, except that an executor, administrator, trustee, or mortgagee, who has acted reasonably, cannot be deprived of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division, and when the action is tried by a jury the costs will follow the event, unless the judge who tried the cause, or the court, for good cause shown, otherwise order: (Ord. LXV.)

Q.—Is the plaintiff entitled to his costs in an action of trespass (in the superior courts) in which he recovers 40s. damages, or is anything required to entitle him to such costs? What alteration has been made in the law with reference to costs in actions for alleged wrongs, in which less than 10*l.* is recovered?

A.—Formerly in actions of trespass or case, if the plaintiff recovered by verdict less than 40*s.* damages, he was not entitled to costs unless the judge certified to give him costs; or unless a notice not to trespass had been given: (3 & 4 Vict. c. 24, ss. 2, 3.)

Now by the 30 & 31 Vict. c. 142, s. 5, and 45 & 46 Vict. c. 57, s. 4, if he recovers a sum less than 10*l.* in any action founded on tort, whether by verdict, judgment by default, or otherwise, he is not entitled to any costs unless the judge certify on the record that there was sufficient reason for bringing the action in the High Court, or unless the costs are allowed by rule or order; but by sect. 67 of the 1873 Act this section only applies to actions in the High Court which could be brought in the County Court. After contradictory decisions by the courts, it is now finally settled by *Garnet v. Bradley* (48 L. T. Rep. 186) (an action for slander, where the majority of the Court of Appeal reversed the decision of the Common Pleas Division, which latter was then reversed by the House of Lords) that 21 Jac. 1, c. 16, and 3 & 4 Vict. c. 24, are now repealed.

Q.—In the absence of the judge or the court making any order as to costs, what amount must a plaintiff recover in actions of tort and contract respectively, to entitle him to costs? Refer, if you can, to the statute upon the subject.

A.—Sect. 67 of the Judicature Act, 1873, embodies sect. 5 of the County Court Act, 1867 (30 & 31 Vict. c. 142, amended by 45 & 46 Vict. c. 57, s. 4), in those actions which can be tried in the County Court. In actions tried by jury, therefore, the amount recovered must not be less than 20*l.* in contract and 10*l.* in tort to entitle a plaintiff to his costs without a certificate.(a)

Q.—If a plaintiff commence an action in covenant, debt, detinue, or assumpsit in the High Court, and shall not recover 20*l.*, is any step necessary to deprive him of his costs?

A.—No; the defendant need not take any step to deprive the plaintiff of costs, unless it be a breach of promise case, in which case he should apply to the judge who tried the cause, or to the court: (Ord. LXV., r. 1;

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(a) From the remarks of Mr. Justice Field in *Evans v. Edwards* (*Law Times*, 24th November, 1883), it seems that when the plaintiff recovers less than 20*l.* in contract, a certificate would now be given almost as matter of course when there is a fair and reasonable expectation that Ord. XIV. will apply; but Mr. Justice Matthew has since refused such an application: (*Calvert v. Davison*, *Law Times*, 26th January, 1884.)

Ohit. Arch. 420, 13th edit. ; *Danby v. Lamb*, 5 L. T. Rep. N. S. 353 ; 30 & 31 Vict. c. 142, s. 5.)

**Q.**—What actions ought to be brought in the County Court, and what penalty is imposed when an action which ought to be so brought is brought in the High Court ?

**A.**—All actions of contract (save breach of promise of marriage) under 20*l.*, and all actions of tort (save libel, slander, malicious prosecution, or seduction) where the amount claimed is under 10*l.*, should be brought in the County Court, otherwise the plaintiff will not be entitled to any costs unless the judge certify on the record that there was sufficient reason for bringing such action in the superior court, or the court or judge allows such costs : (30 & 31 Vict. c. 142, s. 5, and 45 & 46 Vict. c. 57, s. 4.)

**Q.**—In his statement of claim the plaintiff claims 50*l.* for a debt, and 20*l.* for a trespass. The defendant pleads a denial of the debt and payment, to the first ; and not guilty and a justification, to the second. The plaintiff obtains a verdict for 10*l.* on the first, payment being proved for the balance. The defendant succeeds on the justification, and the plaintiff on the plea of not guilty. There is no certificate or order for costs. To what costs, if any, is each party entitled ?

**A.**—Where tried by a jury the defendant will get the costs of the issue found for him ; but the plaintiff is deprived of costs by the 30 & 31 Vict. c. 142, s. 5 : (see *March. Costs*, 141, 2nd edit. ; *Gray's Costs*, 54 ; *Ord. LXV.*)

**Q.**—What protection has been given to defendants in actions for malicious prosecution, illegal arrest, libel, and other actions of tort, by the statute 30 & 31 Vict. c. 142 (County Courts Amendment Act) ?

**A.**—If a defendant make an affidavit that the plaintiff has no visible means of paying the costs if he (the defendant) should obtain a verdict, a judge of the court in which the action is brought may order that, unless the plaintiff give security for costs (to be approved by a master) or satisfy the judge that he has a cause of action fit to be prosecuted in the High Court, all proceedings be stayed ; or may remit the cause to a County Court for trial. The cause will, in the latter event, be heard in the County Court, and the costs of the action subsequent to the order will be according to the scale allowed in the County Courts : (sect. 10.) (a)

**Q.**—If a plaintiff in a superior court prove a debt exceeding 20*l.*, but the defendant prove a cross debt, by which the balance due to the plaintiff is reduced below 20*l.*, can the plaintiff recover his costs without a certificate under the County Courts Act ?

**A.**—No ; for the plaintiff does not recover 20*l.* within the meaning of the 30 & 31 Vict. c. 142, s. 5, as amended : (and see *Beard v. Perry*, 6 L. T. Rep. N. S. 352, overruling *Tonge v. Chadwick*, 25 L. J. N. S.

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(a) The following question may be answered by the above : In an action of tort brought in the High Court by a plaintiff resident in England when the defendant seeks to compel the plaintiff to give security for costs, what allegations must his affidavit contain to obtain the order for such security, and how can the plaintiff resist the application if a *prima facie* case is made out against him ?

202; but see *Walesby v. Gouldstone*, 14 L. T. Rep. N. S. 662, and Ord. LXV.) And where the defendant recovers on a counter-claim, which is not a mere set-off or claim for liquidated damages, so that the plaintiff gets judgment for less than 20*l.*, the plaintiff is entitled to the costs of proof of his claim, and the defendant to the costs of proving his counter-claim: (*Stooke v. Taylor*, 43 L. T. 200.)

**Q.**—When a plaintiff in a superior court recovers less than 20*l.* on contract, are there any cases in which he can recover his costs without certificate or judge's order?

**A.**—Yes; he would be entitled to his costs in a case of breach of promise, tried before a jury, unless otherwise ordered by the judge who tried the cause, or the court.

**Q.**—A statement of claim contains two claims: 1st. For goods sold for 50*l.* 2nd. For slander, damage 10*l.* The defendant pleads as to 15*l.*, parcel of the first count, payment into court of 15*l.*, and denies the residue of the claim. The plaintiff gets a verdict of a jury for 5*l.* on the first claim beyond the sum paid in, and the defendant succeeds as to the residue. Is the plaintiff entitled to costs, and if not, how can he obtain them?

**A.**—The plaintiff will now be entitled to costs, as he recovers 20*l.* on the claim in contract: (45 & 46 Vict. c. 57, s. 4.)

**Q.**—When a verdict of a jury has been obtained in the Superior Courts for less than 20*l.* on contract, and the judge does not certify for costs, what steps can the plaintiff take to obtain his costs, and what would be sufficient grounds to support his application?

**A.**—The plaintiff must show, unless a breach of promise case, to the satisfaction of the court, or the judge who tried the cause, that it was removed from the County Court by *certiorari*, or that there was sufficient reason for bringing such action in the High Court; and the court or judge may by rule or order allow the plaintiff his costs: (see 30 & 31 Vict. c. 142, s. 5, 1873 Act. s. 67, and see Ord. LXV.)

**Q.**—Does it make any difference if the defendant suffer judgment to go by default? Or how does the plaintiff get his costs?

**A.**—By the 30 & 31 Vict. c. 142, s. 5, judgments by default are placed on the same footing as judgments on a verdict, &c., and the plaintiff will not be entitled in such a case to any costs unless specially awarded by the court or such judge.

**Q.**—If an action is brought to recover a debt above 20*l.*, and the defendant pays the plaintiff the debt without the costs, can the plaintiff afterwards proceed to recover the costs?

**A.**—As costs are now in the discretion of the court, it would not be advisable to proceed as formerly with the action; but a summons should be taken out, calling upon the defendant to show cause why he should not pay the plaintiff's costs to be taxed.

**Q.**—When is the higher scale of costs applicable in actions in the High Court?

**A.**—When the court or a judge so order at the trial, hearing, or

further consideration of any cause or matter, or at the hearing of any application therein on special grounds arising out of the nature and importance or the difficulty or urgency of the case, or if the taxing master, under directions given him by the court or judge, thinks such allowance should be made on such special grounds; and in causes and matters pending at the time the new rules came into operation to which the higher scale of costs was applicable, the then scale applies: (Ord. LXV., r. 9.)

*Q.*—To what cases does the lower scale of costs apply in actions in the High Court?

*A.*—In all actions commenced after the new rules come into operation unless otherwise ordered, and in actions then pending where the lower scale was formerly applicable: (*Ib.*, r. 8.)

*Q.*—A. has an action brought against him by B., a carpenter, for, say, 250*l.* A. considers the charge exorbitant, and proposes, through his solicitor, to pay B. 170*l.*, and his costs then incurred. B. declines it. This is at an early state of the cause, say, after writ served, or after statement of claim, and before defence. Is there any mode by which A. can pay or offer to pay that amount to B., so as to prevent his being liable for costs, provided B. does not succeed in recovering more than 170*l.*?

*A.*—A. may now pay money into court any time after service of the writ; if paid in before delivering a defence, he must give notice thereof: (in the form 3, App. B.) If the action proceeds he must plead it in his defence: he is not absolutely entitled to costs now, but would doubtless obtain them from the discretion of the judge: (see Ord. XXII.)

*Q.*—If a plaintiff admits a defence arising after the commencement of action, will he have to pay costs; and if any, what costs?

*A.*—The plaintiff will not have to pay any costs; but he may sign judgment for his costs up to the time of pleading such defence, unless the court or judge may otherwise order: (Ord. XXIV., r. 3.)

*Q.*—Where a plaintiff or defendant obtains a rule for a special jury, and the party obtaining the rule and procuring the special jury succeeds at the trial, but omits to obtain the judge's certificate that it was a cause proper to be tried by a special jury, what effect would the want of such certificate have as to allowing the costs of the special jury in taxing the general costs of the cause?

*A.*—There appears to be no alteration in the old practice. The effect is that such party will not be allowed the costs of the special jury, although he be successful at the trial: (see Sm. Act. 130, 2nd edit. by Foulkes.)

*Q.*—If some issues are found for the plaintiff, and others for the defendant, how does it affect the costs, and how do the affidavits of increase differ to get the witnesses allowed to the respective parties?

*A.*—The costs of any action or issue tried by a jury follow the finding or judgment upon such issue, and are adjudged to the successful party,

unless the judge who tried the cause or the court otherwise orders, for good cause shown: (Ord. LXV., r. 1.)

In the affidavits of increase the party who succeeds upon the material issue must swear that his witnesses were necessary on the issue found for him; and the unsuccessful party must swear that his witnesses were necessary on the issues found for him *exclusively* and solely, and not on any of the issues found against him: (Chit. Arch. 432, 13th edit.; and see Gray's Costs, 70, *et seq.*)

**Q.**—How are the costs adjusted in an action in which the plaintiff seeks to recover 100*l.*, which the defendant reduces to 50*l.* by succeeding to the extent of 50*l.* on a defence of set-off, and the plaintiff only gets a verdict for 50*l.*?

**A.**—The plaintiff is entitled to the general costs of the cause; but the defendant is entitled to deduct therefrom the costs of the issue raised by the defence of set-off which is found for him, unless in either case the judge who tried the cause or the court, for good cause shown, otherwise order: (Ord. LXV., r. 1.) (*a*)

**Q.**—A plaintiff brings an action for a liquidated demand—say 100*l.* for goods sold and delivered. Defendant admits the debt, pays 50*l.* into court, and counter-claims for 50*l.* for personal injuries caused by the negligence of the plaintiff. The jury give a verdict for defendant on his counter-claim for 40*l.* To what costs are the plaintiff and defendant respectively entitled?

**A.**—The plaintiff will be entitled to his costs of the action, except so far as they relate to the defendant's counter-claim, whilst the defendant will be entitled to his costs of the counter-claim: (see *Blake v. Appleyard*, 3 Ex. Div. 195.)

**Q.**—In an action brought by a pauper to which three defences are pleaded, and three issues joined, the defendant recovers a verdict on two issues, being the material issues; but the plaintiff recovers on one issue, though to a certain extent an immaterial one, who will be entitled to the costs; and are the plaintiff's costs on the issues found for him to be deducted from the defendant's?

**A.**—As above seen, the costs of any issues, tried by a jury, &c., are to follow the finding or judgment, except otherwise ordered. But a pauper plaintiff is not obliged to pay costs to the defendant, interlocutory or final. And a person admitted to sue *in formâ pauperis* is not in any case entitled to costs from the opposite party, unless by order of the court or a judge: (see Chit. Arch, 1071, 13th edit.; Sm. Act. 102, 2nd edit. by Foulkes; Ord. XVI., rr. 22-31.) (*b*)

**Q.**—What is the effect of withdrawing a juror on a trial as to costs?

**A.**—Each party will have to pay his own costs. The withdrawal of a juror always puts an end to the cause, and if the action be afterwards

(*a*) By Ord. LXV., r. 27, sub-sect. 21, provision is made for costs being set off or deducted, where costs are payable by and to a party.

(*b*) By Ord. XVI., r. 31, costs ordered to be paid to a person admitted to sue or defend as a pauper shall, unless the court or a judge otherwise direct, be taxed as in other cases.

proceeded with, the defendant may apply to stay the proceedings : (Sm. Act. 147, 2nd edit. by Foulkes ; Chit. Arch. 376, 13th edit.)

**Q.**—When are executors or administrators liable personally to pay the debt or costs of an action brought by or against them ?

**A.**—In actions brought *by* executors or administrators they are now, by stat. 3 & 4 Will. 4, c. 42, s. 31, made liable to costs like other persons, *unless the court otherwise order*. In actions against them, if an executor or administrator pleads a pleading which admits his character of executor. &c., and it be found against him, the judgment will be that the plaintiff recover against him the debt or damages, and costs, to be levied of the goods of the testator, if he has so much in his hands, and if not, then the costs to be levied of the proper goods and chattels of the defendant : (see Gray's Costs, 229, *et seq.*) If the defendant plead a plea which is false within his own knowledge (as *ne unques* executor or administrator or a release to himself or the like), and it be found against him, the judgment is *de bonis testatoris si, &c., et si non, &c., de bonis propriis*, or perhaps unconditionally *de bonis propriis* : (see Chitty's Forms, 11th edit. 503.)

**Q.**—When an infant plaintiff is nonsuited, or has a verdict against him, who is liable to the payment of costs ?

**A.**—The next friend of the infant is liable for the costs : (Chit. Arch. 1019, 13th edit. ; and see Ord. XVI., r. 16.)

**Q.**—When a judge grants an order to examine witnesses in a cause, and they afterwards appear at the trial, and are examined, what becomes of the costs of the commission ?

**A.**—If the interrogatories are not given in evidence, the costs of them are not allowed : (Gray's Costs, 364 ; *Ridley v. Sutton*, 7 L. T. Rep. N. S. 693.)

**Q.**—Must the successful party under an award wait until the time for setting aside the award has expired before he can tax his costs ?

**A.**—No ; he may tax his costs prior to the expiration of the time for setting aside the award : (Ord. LXV., r. 15.)

**Q.**—State the result as to costs when, in an action of libel or slander, the plaintiff recovers only 5s.

**A.**—When tried by a jury the plaintiff will be entitled to his costs unless the judge or the court otherwise order : (Ord. LXV., r. 1 ; *Garnet v. Bradley*, *ante*, p. 127.) When tried before the court without a jury they are in the discretion of the court.

**Q.**—At what stage of a cause will a plaintiff or defendant be entitled to the costs of briefs, and of otherwise preparing for trial ?

**A.**—Not until after issue joined and notice of trial given : (*Freeman v. Springham*, 14 C. B. 197 ; s. c. 8 L. T. Rep. N. S. 384 : *Curtis v. Platt*, 10 *ib.* 383 ; s. c. 33 L. J. 255.)

**Q.**—What costs are usually allowed under a rule for costs of the day ?

**A.**—Such costs as have been incurred in preparing for trial, and which must be incurred again at a future time if the trial should proceed (Chit. Arch. 1496, 12th edit.), such as retainer to counsel, resealing subpoenas,



copy and service thereof on witnesses, and, if briefs delivered, refreshers to counsel, &c. : (see Scott's Costs.)

Q.—What length of notice at common law of taxing costs is required ?

A.—One day's notice, where a notice is necessary. A copy of the bill of costs and affidavit of increase (if any) must also be given to the opposite party : (Ord. LXV., r. 16.)

Q.—What is the effect as regards the recovery of costs as against the client, and as against an adverse party respectively, of a solicitor omitting to take out his certificate ?

A.—The solicitor cannot bring an action or suit against the client to recover his fees or disbursements for business, &c., done whilst he was uncertificated. But the client is not to be prejudiced thereby, so that he is not deprived of his right to costs as against the opposite party to the extent of advances made by the client, if he was in ignorance of his solicitor's irregularity : (Ohit. Arch. 64, 70, 13th edit.)

Q.—Make out a plaintiff's bill of costs on a judgment by default with a judge's order and substituted service.

A.—The following (a) is an example :

IN THE HIGH COURT OF JUSTICE :  
Queen's Bench Division.

*Brown v. Smith.*  
HILARY SITTINGS, 1878.

	£	s.	d.
Letter before action	...	3	6
Instructions to sue	...	6	8
Writ of summons copy to file and attending to issue...	...	6	8
Paid	...	10	0
Statement of claim	...	13	4
Copy for service	...	1	0
(Or per folio beyond two), 4d.			
Numerous attendances at defendant's residence for the purpose of serving him personally, obtaining necessary information to ground application for substituted service	...	1	0 0
Drawing affidavit for order for substituted service, at per folio 1s. ...			
Engrossing at per folio 4d.	...	1	
Copy writ to annex	...		
(Or per folio beyond two), 4d.			
Searching appearance and paid	...	4	4
Attending swearing affidavit	...	6	8

(a) As an example of the style of a bill of costs in former times, the following extract taken from a book published by the Society of Antiquarians, and set out by Mr. Kennedy in an addenda to his published argument in *Kennedy v. Brown* is given :—

*From the Accounts of the Churchwardens of St. Mary's :*

1491. For costs in the law—	s.	d.
To Mr. Wode, Serjeant	3	4
To Mr. Small and Mr. Marrow, each	3	4
To Mr. Wode, Small, and Marrow, each	10	0
For copying of the testament to Mr. Marrow's clerk	3	4
1500. To Mr. Marrow at my Lord Mayor's house, when the Abbot's counsel were there to overrun the note	3	4
To Mr. Thomas Sharpe for writing the note that was destroyed by us at the Abbot's inn	0	8
For a fair copy of the note	0	4



	s.	d.
Paid oath and exhibit ... ..	2	6
Attending Master when he granted order ... ..	6	8
Paid filing affidavit ... ..	2	6
Paid for order and copy for service ... ..	6	0
Copy writ for service, with order ... ..	1	0
(Or per folio beyond two), 4 <i>d.</i>		
Service of both at defendant's residence ... ..	5	0
Attending searching appearance and paid ... ..	4	4
Affidavit of service and oath ... ..	6	6
Filing ... ..	2	6
Drawing judgment ... ..	3	4
Attending to enter ... ..	6	8
Paid ... ..	10	0
Office copy per folio, 6 <i>d.</i>		
Copy order to keep ... ..	1	0
Drawing bill of costs and copy ... ..	4	0
Attending taxing ... ..	6	8
Paid ... ..	2	0
Letters, &c., if agency ... ..	6	0
(If not), 3 <i>s.</i>		
Extra charge for service, if by agent ... ..	7	0

### APPEAL.

*Question.*—To what tribunals respectively do appeals lie from the Queen's Bench Division?

*Answer.*—Appeals are now in all cases made to the Court of Appeal by motion for a rehearing, and may be from the whole or any part of the judgment or order (Ord. LVIII., r. 1.) Fourteen days' notice must be given in case of a judgment, four days in case of interlocutory order (*Ib.* r. 3); and fresh evidence of facts can be read without special leave, in case of interlocutory applications, in other cases only by special leave on special grounds; but in all cases as to matters which have occurred after the decision appealed from (*Ib.*, r. 4.)

*Q.*—Within what time must an appeal be brought—

(1) From a master to a judge.

(2) From a judge at chambers to the court.

*A.*—(1) Within four days from the decision complained of or such further time as may be allowed by a judge or master: (Ord. LIV., r. 21.)

(2) In the Queen's Bench Division within eight days after the decision appealed against, or, if no court to which such appeal can be made shall sit within such eight days, then on the first day afterwards on which the court may be sitting: (Ord. LIV., r. 24.)

If the last of the eight days falls on a Sunday, the motion may be made on the following day: (*Taylor v. Jones*, 1 C. P. Div. 87.)

*Q.*—Within what time can a party to an action appeal against an interlocutory order or judgment? The like, against a judgment or order not interlocutory?

*A.*—No appeal from an interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by leave, be brought after the expiration of one year: (Ord. LVIII., r. 15.) The time is calculated in

case of an appeal from an order in chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other cases, from the time when the judgment or order is signed, entered, or otherwise perfected, where granted; if not, from the date of refusal.

*Q.*—What was the difference between error and appeal, and give an instance of each?

*A.*—Error was an appeal against the judgment of a court grounded either on suggestion of some fact which rendered such judgment erroneous—for instance, that the unsuccessful party was an infant, and appeared by attorney, or on some error of law apparent on the face of the proceedings; it partook more of the nature of a rehearing than appeal. Whereas an appeal, strictly speaking, was an application to a higher court to vary the judgment of an inferior court, as for example where a rule had been made absolute or refused on an application for a new trial, where it was applied for on the ground of the judge having ruled contrary to law. So an appeal would lie from a master to a judge at chambers, and from such judge to the court. (*a*)

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### EXECUTION.

*Question.*—How is a judgment enforced, and state the different processes of execution to recover a judgment debt?

*Answer.*—If for payment of money, it may be enforced by any of the modes by which a judgment or decree for payment of money of any court whose jurisdiction is transferred by the principal Act might have been enforced: (Ord. XLII., r. 3.) A judgment is enforced by writs of execution, which formerly were either writs of *fieri facias*, *capias ad satisfaciendum* or *elegit*; also *levari facias*, and *extent*; but the *ca. sa.* may be said to be gone, the *levari facias* is abolished; *elegits* do not now extend to goods (46 & 47 Vict. c. 52, s. 146), and an *extent* is almost entirely appropriated to the Crown: (Sm. Act. 180, 2nd edit. by Foulkes: 32 & 33 Vict. c. 62, s. 5.) Decrees were enforceable by attachment and sequestration. (*b*)

*Q.*—What are the writs of *fi. fa.* and *ca. sa.* and whence are these names derived? Can they be issued together, and can the latter be always resorted to? State any change in the law as to either of these writs.

*A.*—A *fi. fa.* is a writ of execution directed to the sheriff, commanding him that of the goods and chattels of the defendant, he *cause to be made* (therefore called *fieri facias*, from which the contraction *fi. fa.* is derived) the sum recovered by the judgment. The *ca. sa.* is (or rather was) a writ of execution issued after judgment, commanding the sheriff to *take* the defendant and him safely keep, and have in court on the return day to *satisfy* the plaintiff. The words *ca. sa.* are a contraction of *capias ad satisfaciendum*, meaning *to take to satisfy*. A *fi. fa.* and *ca. sa.* might

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(*a*) As to appeals to the House of Lords, see *post*, Equity Division.

(*b*) No attachment can issue without leave of a court or judge, to be applied for, on notice to the party against whom the attachment is to issue: (Ord. XLIV. r. 2.)

issue together, but only one be executed: (Sm. Act. ch. 10.) By the 32 & 33 Vict. c. 62, it is enacted that (save as excepted) no person is to be imprisoned for default of payment of money: (s. 4.) And even where certain commitments for small debts are allowed, the imprisonment is not to operate as a satisfaction of the debt: (s. 5.)

**Q.**—What is a writ of “*scire facias*?”

**A.**—It is a writ (founded on some record) requiring the person against whom it is brought to show cause why the party bringing it should not have advantage of the record; or else why the record should not be annulled and vacated: (3 St. C. 8th edit. 613.)

**Q.**—Within what period must execution be sued out after judgment is signed?

**A.**—Within six years from the recovery of the judgment, and during the lives of the parties if no change have taken place in the parties entitled or liable to execution; after this time before execution can issue an order must be obtained from the court or judge if satisfied of the party's right to issue execution; or any issue or question necessary to determine the right of the parties may be ordered to be tried in any way in which any question in an action might be, and terms as to costs might be imposed: (Ord. XLII., r. 23.)

**Q.**—How long do writs of execution remain in force after issuing?

**A.**—If unexecuted, only for one year from the issue of the writ; unless renewed by leave of court or judge by being resealed, or by giving a written notice of renewal to the sheriff, signed by the party or his solicitor, and sealed by the court: (Ord. XLII., r. 20.)

**Q.**—A levy having been made under a *fi. fa.*, in what cases and when can another writ of execution issue on the same judgment?

**A.**—In case the whole amount is not levied, and when the *fi. fa.* has been returned. But if on seizure the sheriff finds the goods already distrained for rent, or in *custodiâ legis*, or assigned under a bill of sale, and he withdraws, another writ of execution may issue before the return of the *fi. fa.*

**Q.**—Is there any, and what, property that cannot be taken in execution?

**A.**—The following goods cannot be taken under a *fi. fa.*: Wearing apparel and bedding of any judgment-debtor, or his family, and the implements of his trade to the value of 5*l.*; goods in the custody of the law, as by distress; fixtures which are fixed in the freehold and go to the heir. The goods of a stranger cannot be seized, although in the possession and apparent ownership of the defendant. Under an *elegit*, the oxen and beasts of the plough were excepted out of the debtor's goods and chattels; nor can an advowson in gross or glebe lands, &c., be taken: (see Sm. Act. 249, 263, 10th edit.) (a)

**Q.**—Can anything besides goods be levied or charged in execution? and, if so, state what, and by what form of proceeding.

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(a) The following question may be answered from the foregoing: Can the goods of A. B. be taken and sold under a *fi. fa.* at the suit of a judgment creditor of C. D. if upon C. D.'s premises?

**A.**—Yes ; under a *fi. fa.* the sheriff may seize money or bank notes, cheques, bills of exchange, promissory notes, specialties, or other securities for money belonging to the defendant ; and he may deliver the *notes and money* to the plaintiff, and hold the cheques, &c., as a security for the amount to be levied ; and may sue in his own name for the recovery of the sum or sums secured thereby when the time of payment arrives : (1 & 2 Vict. c. 110, s. 12.) He may also sell a lease or term of years belonging to the debtor, and execute an assignment of it under his seal of office to the purchaser ; but he cannot sell an equity of redemption : (Sm. Act. 195, 2nd edit. by Foulkes.)

**Q.**—What alteration did the 1 & 2 Vict. c. 110, make as to executions after judgment ?

**A.**—It enables the sheriff to seize moneys and securities for money, &c., as above detailed.

**Q.**—If a debtor, against whom your client has signed judgment, is possessed of no personal estate, but is entitled to the equity of redemption in some freehold land on which there is a legal mortgage, how should you enforce the judgment, and would it be necessary to commence any fresh action for the purpose ?

**A.**—Before the Judicature Act the plaintiff would have had to file a bill in the Court of Chancery to obtain a declaration of a charge for the amount of his judgment, and a receiver would have been appointed on an interlocutory motion ; but a judgment creditor can now obtain the appointment of a receiver on motion or summons in the original action : (*Smith v. Cowell*, 50 L. J. 38, Q. B. ; see also 27 & 28 Vict. c. 112, s. 1 ; Judicature Act, 1873, s. 25, sub-sect. 8, and Ord. XLII., r. 28.) The plaintiff's right to proceed in the Chancery Division is not, however, taken away : (*Anglo-Italian Bank v. Davies*, L. Rep. 9 Ch. Div. 275 ; 47 L. J. 833, Ch.)

**Q.**—How should you enforce judgment for 100*l.* against a clerk who has no income except a salary of 100*l.* from his employers, and no assets except a debt of 25*l.* due from A.B. to him, and a vested interest in reversion in a legacy of 50*l.* ?

**A.**—I should take out a judgment summons, and on proving the salary an order would be made for payment of a weekly or monthly sum in satisfaction of the judgment : (Debtors' Act, 1869, s. 5.) I should also obtain a garnishee order in order to obtain the 25*l.*, and issue a writ in the Chancery Division to have a declaration of a charge on the vested interest in reversion to the amount of my unsatisfied judgment.

**Q.**—How can a judgment recovered against a married woman be enforced, supposing she is beneficially entitled to her separate use to the income of a sum of stock held by a trustee ?

**A.**—A charging order should be obtained on the income under 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82, and Ord. XLVI. of Judicature Rules, and such order would entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor, but it cannot be enforced for six months.

**Q.**—In what cases may a party issue execution before judgment on

trial, inquisition, warrant of attorney, or *cognovit*; and how must he proceed in such cases?

A.—If the party has obtained an order for payment of money or costs, it has the effect of a judgment, and may be enforced by execution, as by Ord. XLII., r. 20, every order of a court or judge may now be enforced in the same manner as a judgment to the same effect.

Q.—Is there any, and what, recent alteration in the plaintiff's power of taking a defendant in execution?

A.—By the 32 & 33 Vict. c. 62, s. 4, it is enacted that no person shall be arrested or imprisoned for making default in payment of a sum of money, except—

- (1) Sums in the nature of a penalty not arising out of contract;
- (2) Sums recoverable summarily before a justice of the peace;
- (3) Sums due from trustees, &c., ordered to be paid by any court of equity;
- (4) Sums ordered by the court to be paid by solicitors as such;
- (5) Sums ordered by the Courts of Bankruptcy to be set aside by debtors out of their salaries or incomes for the payment of creditors;
- (6) Sums ordered to be paid under the authority of this Act; and even here the imprisonment is not to continue beyond a year.

But by 41 & 42 Vict. c. 54, in the exceptions numbered 3 and 4, any court or judge making the order for payment, or having jurisdiction in the action or proceeding, may grant or refuse, either absolutely or upon terms, the process for imprisonment.

A power to commit, however, is still given by sect. 5 of the former Act, which allows any court to commit to prison for a period not exceeding six weeks, or until payment of the sum due, any person making default in payment of any debt or instalment of a debt due from him in pursuance of any order or judgment, provided that it is proved to the satisfaction of the court that the person making default has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default. This power is, except in the High Court, to be exercisable only by a judge or his deputy, by an order made in open court, and showing on its face the ground on which it is issued.

It is further provided that imprisonment under this section is not to operate as a satisfaction, as before shown.

Q.—What steps should be taken to enforce payment of money under an order for payment made by a judge or master at chambers?

A.—Application for a commitment should be made under sect. 5 of the Debtors' Act, 1869. Proof of the means of the debtor should be given by affidavit, but a judge may order a *vivâ voce* examination of the debtor or any other person, or the production of any document.

Q.—If the cause of action be matter of *contract* against *several*, may execution issue, and the damage be levied against either, and can he compel contribution? and if so, how? and will it be the same in tort? (a)

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(a) Also asked thus: If one of several defendants has had execution issued against him and been compelled to pay the whole damages and costs, are the others thus exonerated, or, in what case has he a right of action for contribution against the others, and when has he no such right?

A.—The execution must follow the judgment, and, therefore, should be issued against all (Ohit. Arch. 509, 13th edit.); but the execution may be levied against one, and in actions *ex contractu* he may compel the others to contribute by bringing an action against them, but in most cases of tort he cannot compel a contribution: (*Merryweather v. Nixan*, 2 Sm. L. C. 296; and notes to *Lampleigh v. Brathwaite*, 1 Sm. L. C. 71.)

Q.—Can the individual partners require a judgment creditor of the firm to pursue his remedy against the partnership property before having recourse to the separate property of the partners? Give a reason for your answer.

A.—Certainly not; the creditor's right is paramount to all rights of his debtors *inter se*, and he is entitled to pursue his various remedies in any way he pleases.

Q.—What is a sequestration, and to what species of property does it apply?

A.—At law a sequestration signified an execution for a debt issued against a beneficed clerk or clergyman, when he had no lay fee within the sheriff's bailiwick: (see Holth. L. D., 2nd edit.; *et post.*)

In equity it was a writ formerly issued against the property of a peer, Member of Parliament, or corporation who could not be taken under an attachment. It is now issued against a person disobeying any order of the court to do any act within a limited time, but not for payment of costs: (Ord. XLIII., r. 6.)

Q.—How is an *elegit* executed, and what may be seized under it?

A.—Formerly it was executed by the sheriff summoning a jury, who appraised the debtor's goods and chattels, and inquired as to the value of his lands. After inquisition the debtor's goods and chattels (except oxen and beasts of the plough) were delivered to the creditor at the appraised price, and if they were not enough the lands and tenements (including copyholds) (a) were then delivered to him; and the writ was returned; but by the Bankruptcy Act, 1883, the writ is no longer to extend to goods. The possession of the land given to the creditor by the sheriff is only legal, and if the debtor will not give up actual possession an action must be brought: (see 1 & 2 Vict. c. 110; Sm. Act. 207, 2nd edit. by Foulkes.)

Q.—What is the shortest time within which an execution can be issued against a defendant after the service of the writ of summons?

A.—Immediately after the expiration of eight days after service of the writ inclusive of the day of service.

Q.—What is the right of a landlord to whom rent is due, if goods of the tenant on the demised premises are taken in execution by the sheriff? and has the landlord any, and what, remedy against the sheriff?

A.—He has a right, before the goods are removed, to be paid a year's rent, by the execution creditor, if so much be due to him. If the letting be a weekly one, he can only claim four weeks' arrears; and if it be for any other term less than a year, for not more than the arrears accruing during four terms of payment. If these sums be not paid he may

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(a) Before the 1 & 2 Vict. c. 110, only a moiety of the freeholds, and none of the copyholds, could be taken: (Smith, *ubi sup.*)



apply to the court for an attachment against the sheriff, or bring an action against him: (Chit. Arch. 555, 13th edit.; Sm. Act. 199, 2nd edit. by Foulkes.)

Q.—A man who owes two years' rent of his house, and who has given a bill of sale of his goods to a *bonâ fide* creditor, and against whom judgment in an action has been signed, owes the landlord, the judgment creditor, and the holder of the bill of sale 200*l.* each. (1) The landlord distrains; then the judgment creditor puts in execution under a *fi. fa.*; and then the bill of sale holder seizes. (2) The execution is put in first; then the landlord distrains; and then the bill of sale holder seizes. (3) The bill of sale holder seizes; then the landlord distrains; and then the execution is put in. The total value of his goods being under 300*l.*, what will each creditor receive in each case?

A.—In each case the landlord will receive 200*l.* and costs of distress, and the bill of sale holder the remainder, if bill properly registered. As, although the landlord, in case 2, could only claim a year's rent as against the execution creditor, yet, as the latter must give way to the bill of sale holder, and consequently withdraw, the landlord's full right against the bill of sale holder would operate.

Q.—If a debtor in execution escape from the custody of the sheriff, or other person having the safe custody of such debtor, what remedy has the creditor?

A.—He may bring an action against the sheriff. He may also proceed against the sheriff by attachment, which will only be stayed by the sheriffs paying the damage sustained by the creditor. The creditor may also issue execution against the debtor's goods or lands, or bring an action on the judgment: (Chit. Arch. 608, 13th edit.; Sm. Act. 182, 2nd edit. by Foulkes.)

#### *Attachment of Debts.*

Q.—What is the meaning of a garnishee order?

A.—It is an order made by a judge of the High Court attaching a debt recoverable in the hands of a debtor (called the garnishee) of a person against whom judgment has been recovered.

Q.—What debts can be attached?

A.—As a general rule, debts due to the debtor in which he is beneficially interested, and for which he can sue, can be attached—so debts due to a corporation unless excepted by Act of Parliament—so may part of a debt—so may rent owing to the judgment debtor, and several others, and an equitable debt: (see *Wilson v. Dundas and Stevenson*, Bitt. Prac. Cas. CXII.; see Sm. Act. 216, 2nd edit. by Foulkes.)

Q.—Where there is reason to believe that a judgment debtor has debts owing to him from third parties, is there any, and what, mode by which the judgment creditor can obtain payment from these parties?

A.—The judgment creditor should obtain an order that the judgment debtor be orally examined before an officer of the court or other person appointed, as to what debts are owing to him, and for production of any books or documents: (Ord. XLII., r. 32.) After such oral examination, if



it turns out that the debts are owing, the judgment creditor may proceed to have them attached in the mode pointed out *infra*.

**Q.**—Is there any mode by which a judgment creditor can attach any debts due to the judgment debtor, and how? And can the garnishee dispute his liability?

**A.**—The court or judge may, upon the *ex parte* application of the judgment creditor, upon affidavit by himself or his solicitor; stating that judgment has been recovered or the order made and is still unsatisfied, and to what amount, and that any other person (called the garnishee) is indebted to the judgment debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person to the judgment debtor be attached to answer the judgment debt; and the garnishee may, either by this order or by a subsequent one be ordered to appear, and show cause why he should not pay the amount due from him to the judgment debtor in satisfaction of the judgment.

If the garnishee does not pay the amount into court, or dispute the debt, or does not appear upon the summons, the court or judge may order execution to issue. If the garnishee disputes his liability, the court or judge, instead of this, may order an issue to be tried to decide the point: (Ord. XLV., rr. 1, 3, 4.) (a)

**Q.**—If A. sues B. for 5*l.* and C. is indebted to B. in a like amount, has A. any remedy against C., and if so, what remedy?

**A.**—After A. has obtained judgment, the remedy by attaching the debt in C.'s hands is open to him, as stated *supra*. However, as the amount is only 5*l.*, the judge might under the old practice refuse to interfere if he thought fit: (23 & 24 Vict. c. 126, s. 28.) And this practice is still followed.

**Q.**—Can wages due, or accruing due, be attached? Give the reason for your answer.

**A.**—No. By the 33 & 34 Vict. c. 39, s. 1, it is enacted that no order for the attachment of the wages of any servant, labourer, or workman, shall be made by the judge of any court of record, or inferior court.

### *Charging Stock.*

**Q.**—Can Government stocks, funds, or annuities, of a judgment debtor be made chargeable with the amount of such judgment debt?

**A.**—Yes; any divisional court or any judge may make an order that any Government stock, funds, annuities, &c., standing in the name of the debtor, in his right, or in the name of any person in trust for him, shall stand charged with the payment of the judgment debt and interest. This charge, however, cannot be enforced for six months after the order, and was formerly relinquished by the creditor taking the debtor in execution on the judgment: (Ord. XLVI.; see Sm. Act. 219, 2nd edit. by Foulkes. (b))

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(a) These questions may be answered from the above: The Procedure Act, 1854, speaks of a garnishee; to whom is this term applied?

A garnishee disputes his liability: by what means is it to be established?

(b) The provisions of 1 & 2 Vict. c. 110, ss. 14 and 15; and 3 & 4 Vict. c. 82, s. 1, still apply.

*Habeas Corpus, &c.*

**Q.**—State a few of the Acts of Parliament securing the personal liberty of the subject; and state in whose reigns they were passed.

**A.**—After Magna Charta comes the 3 Car. 1, commonly called the Petition of Right; the 16 Car. 1, c. 10, asserting the right to, rather than giving a *habeas corpus*; and the Act commonly called the Habeas Corpus Act, 31 Car. 2, c. 2 (amended by 56 Geo. 3, c. 100, regulating the mode, &c., of obtaining a *habeas corpus*: (see 1 St. C. 144, 8th edit.; Hallam's Const. Hist. 10-15, vol. 3, 9th edit.)

**Q.**—What is the personal security acquired by the Habeas Corpus Act; and what is the mode of obtaining *habeas corpus*?

**A.**—The security acquired by this Act is the prompt issue and return to *habeas corpus*, so that a person unjustly detained in prison may obtain his release. A writ of *habeas corpus* is obtained from the court on motion in term, and from a judge at chambers by summons in vacation: (see 4 St. C. 353 *et seq.*, 8th edit., and see hereon *Ex parte Cobbett*, 30 L. T. Rep. 322; Hallam, *ubi sup.*)

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**REVIVAL OF JUDGMENTS.**

**Question.**—When is it necessary to revive a judgment before issuing execution, and how is such revival effected?

**Answer.**—Revival of judgments is practically superseded by the new practice, but when six years have elapsed since the judgment, or any change has taken place by death or otherwise in the parties entitled to execution, the party alleging himself to be entitled to execution may apply to the court or a judge for leave to issue execution accordingly, which the court or judge may order, or may direct any issue or question necessary to determine the rights of the parties to be tried in any of the ways that a question in an action may be tried, and upon such terms as to costs as may seem just: (Ord. XLII., r. 22.)

**Q.**—If either plaintiff or defendant die after interlocutory and before final judgment, will the action abate, or how must you proceed to final judgment?

**A.**—If the cause of action would have survived to or against the deceased executors or administrators, the proceedings may be continued by obtaining an order that the proceedings in the action be carried on between the continuing parties to the action, and such new party or parties, which may be obtained *ex parte* from the court or judge upon allegation of the facts: (Ord. XVII., r. 4.)

**Q.**—What proceedings would you take in order to enforce a judgment against the heirs, executors, or administrators of a defendant?

**A.**—Apply for leave to issue execution, as stated *supra*.

**Q.**—A creditor, having obtained a judgment against a debtor, dies. What is required to be done by his executor, in order that he may be in a position to attach a debt due to the judgment debtor, with a view to satisfy the judgment recovered by his testator?

A.—The executor should obtain an order to issue execution under Ord. XLII., r. 23, and then apply in the usual way for his garnishee order.

Q.—Judgment against two defendants, and one dies; what is necessary to enable a plaintiff to take out execution, and against whom will the execution issue?

A.—If it is a personal action, and one dies within six years after judgment, execution by *fi. fa.* may be sued out, but should be levied against the survivor only. If the plaintiff wish to proceed against the realty, he must obtain leave to issue execution against such survivor, and the heir and *terre tenants* of the deceased, to have execution against the lands and goods of the former and the lands of the latter: (see Arch. Pr. 930, 19th edit., and Ord. XLII., r. 23.)

Q.—Action against an executor—defendant's defence is *plene administravit*. What is meant by such defence? and if the plaintiff cannot dispute it, but has reason to suppose future assets will be coming to the testator's estate, what steps should he take?

A.—The meaning of the defence is, that the executor has fully administered the assets come to his hands. If the plaintiff cannot disprove this, and there are other assets to be got in, he signs judgment of *quando acciderint*, and when the assets come into the hands of the executor, proceed as in next answer.

Q.—Where a plaintiff has obtained a judgment against a defendant in the character of executor or administrator, in respect of future assets, when they may come to such defendant's hands, and such assets afterwards come to his hands, what steps should the plaintiff take in order to make such assets available to satisfy the judgment?

A.—Formerly this was done by *scire facias*, tested and proceeded upon in like manner as a writ of revivor (17 & 18 Vict. c. 125, s. 91); the plaintiff should now proceed under Ord. XLII., r. 9, of the order, by which after demand made upon a party he might apply for leave to issue execution against him.

## ARREST.

Question.—An Act passed for the abolition of arrest; do you understand that the power of arrest at the commencement of an action is in all cases taken away, or is there any excepted case?

Answer.—By the Debtors Act, 1869 (32 & 33 Vict. c. 67, s. 4), imprisonment for debt is abolished, with certain exceptions: (*ante*, p. 138) And by sect. 6, where the plaintiff in any action in a superior court in which, if brought before the commencement of this Act, the defendant would have been liable to arrest, proves, to the satisfaction of a judge, that he has good cause of action against the defendant to the amount of 50*l.*, and that there is probable cause for believing that the defendant is about to quit England unless apprehended, and that defendant's absence will materially prejudice the plaintiff in the prosecution of such action, such judge may order the defendant to be arrested and imprisoned for any

period not exceeding six months, unless he give security not to go out of England without leave of the court.

**Q.**—When it is sought to arrest a defendant under the provisions of the Debtors Act, 1869, what is essentially necessary to be stated in the affidavit?

**A.**—That the plaintiff has good cause of action against the defendant to the amount of 50*l.* or upwards, and that there is probable cause for believing that the defendant is about to quit England, unless he be forthwith apprehended, and that the absence of the defendant will materially prejudice the plaintiff in the prosecution of his action. But this last is not necessary where the action is for a penalty, or sum in the nature of a penalty other than a penalty in respect of any contract.

**Q.**—A plaintiff apprehends, after service of a writ, that the defendant is going out of the jurisdiction of the court from whence the writ issues: is there any means of stopping him, and how is it to be effected?

**A.**—Yes; the plaintiff may obtain (on the above affidavit) a judge's order to arrest and imprison the defendant for any period not exceeding six months, unless he give security not to go out of England without leave of the court. The order of commitment before delivery to the sheriff should be indorsed with the particulars required by Ord. XLII., r. 13. The sheriff thereupon makes the arrest. (*a*)

**Q.**—What is the lowest sum for which a defendant can be arrested before judgment?

**A.**—As already shown 50*l.* is the lowest sum.

**Q.**—What is the first step in order to arrest a defendant?

**A.**—To issue a writ of summons, then make an affidavit of the facts set out *supra*.

**Q.**—What persons were exempt from arrest on civil process? Distinguish between a permanent and a temporary privilege.

**A.**—The following were privileged absolutely on civil process:—The Royal Family and their officers and domestics; peers and peeresses; foreign ambassadors and their domestics; the judges, &c. The following enjoyed a temporary privilege: Members of Parliament during the session and forty days before and after it; parties, counsel, solicitors and witnesses in the cause, whilst going to, attending at, and returning from court; a clergyman whilst performing, or going to or returning from performing, divine service, &c.: (see Sm. Act. 297, 301, 10th edit.) But imprisonment for debt is now abolished with the exceptions before stated.

**Q.**—State the different methods by which a defendant may obtain his discharge from arrest.

**A.**—By depositing in court the amount mentioned in the order, or giving a bond with two sufficient sureties (or more with leave of a judge) to the plaintiff, or with the plaintiff's consent, any other form of a security: (Rule 7 under the Debtors Act, 1869.) The defendant may also, at any time after arrest, apply to rescind, or vary the order of committal, or to be

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(*a*) The remedy by *ne exeat regno* in such cases for equitable debts still exists in the Chancery Division of the High Court.

discharged from custody : (Rule 6.) In such case the defendant should, of course, support his application by affidavits, contradicting those used by the plaintiff : (see *Ohit. Arch.* 696, 13th edit.)

*Q.*—Up to what stage of the proceedings in a cause may a defendant be arrested upon a judge's order for that purpose ?

*A.*—At any time after the commencement of the action, and before final judgment obtained therein : (see *Sm. Act.* 110, 2nd edit. by Foulkes.)

*Q.*—State some of the most common objections to the sufficiency of sureties.

*A.*—That they are solicitors or solicitors' clerks ; that they are sheriffs' officers engaged in the execution of process ; that they are not house-keepers or freeholders ; that they are indemnified by the defendant's solicitor ; that they are hired ; that they are not worth the amount of property for which they come to justify : (see *Ohit. Arch.* 703, 704, 13th edit.)

## ACTIONS BY AND AGAINST PARTICULAR PERSONS AND CORPORATIONS.

*Question.*—What are the exceptions to the general capacity to sue enjoyed by all persons in England ?

*Answer.*—They are where the right of action accrues to a person under disability, &c., as infants, idiots and lunatics, outlaws, felons, alien enemies, or bankrupts : (see *post.*)

*Q.*—How must a corporation aggregate sue or defend ?

*A.*—By attorney appointed under their common seal : *Sm. Act.* 321, 10th edit.)

*Q.*—What formality is generally necessary to make a contract by a municipal corporation binding, and what step must be taken preliminary to bringing an action against such a body ?

*A.*—The contract must be under their common seal, except

- (1.) Cases in which the rule would defeat the objects for which the corporation was created ;
- (2.) Cases in which the operation of the rule would occasion great and constant inconvenience : (*Anson on Contracts*, 2nd edit. 54 ; and see *Wells v. The Mayor of Kingston-upon-Hull*, *L. Rep.* 10 C. P. 402.)

Where the action is brought for anything done or omitted under the Public Health Act, 1875, one month's notice of action must be given.

*Q.*—When judgment has been recovered against the registered officer of a joint-stock company, can it be enforced against the individuals forming that company ?

*A.*—Not if the company is registered as a limited company under the Act of 1862. If the company has no assets on which to levy, the only remedy is to petition the Court of Chancery for a winding-up order and to settle contributories, &c. : (25 & 26 Vict. c. 89.) And execution cannot issue against shareholders of companies not so registered unless the

statute of incorporation allows it; and then the course pointed out by the Act must be followed. Sometimes the mode is by *sci. fa.*, in others by suggestion on the record, or by rule of court or judge's order: (Sm. Act. 320-343, 10th edit.)

Q.—In an action against executors for a debt due by their testator, which of the executors should be joined as defendants?

A.—All the executors who have proved the will should be made defendants: (Sm. Act. 361, 10th edit.)

Q.—A. dies and by his will appoints B. and C. to be his executors, and they prove his will; B. afterwards dies, leaving C. him surviving. C., the surviving executor, then dies intestate, and D. becomes administrator of his effects. Debts due to A. remain outstanding, and for the recovery of them actions become necessary; can such actions be maintained by D., or who is the proper party to bring them?

A.—The actions cannot be maintained by D., because he, being only administrator of C., does not represent the testator A.; administration *de bonis non* must therefore be taken out: (see Matt. Exors. 306, 2nd edit.)

Q.—When a judgment is recovered against an executor sued as such executor, what is the effect of the judgment when the executor has assets to cover both debt and costs, and what is the effect of the judgment when he has no assets to cover either debt or costs?

A.—In general, the plaintiff, upon a judgment against an executor, is entitled to levy debt and costs out of the assets of the testator only, but if these are insufficient, then execution for the costs may be levied against the goods of the executor himself. If, however, the defendant deny his character of executor, then in the case of a judgment against him, and there being no assets of the testator, he renders himself personally liable to both debt and costs: (Chit. Arch. 1009 *et seq.*, 13th edit.)

Q.—In an action against an executor he pleads "*plene administravit*" only. How should the plaintiff proceed?

A.—He should sign judgment of *quando acciderint*, and when the assets come into the hands of the executors proceed under Order XLII., r. 9, to obtain execution: (see *ante*, p. 143.)

Q.—In an action against an executor, if he plead "*plene administravit præter*," how should the plaintiff proceed?

A.—If the plaintiff cannot disprove this, he should sign judgment presently as to the assets admitted, and as to the rest judgment *quando acciderint*; and proceed as above stated.

Q.—How can an infant maintain an action?

A.—By next friend, in the manner practised formerly in the Court of Chancery; the consent of the person who is to be next friend must be obtained, and filed with the proceedings: (Ord. XVI., r. 16.)

Q.—If an action be brought against an infant, how must he appear to defend it?

A.—An infant must defend by guardian, appointed for that purpose in the manner formerly practised in the Court of Chancery: (*Ib.*, and see *post.*)



**Q.**—Can a married woman without her husband's concurrence give a valid receipt or sue for wages earned by her apart from her husband? Give the reason for your answer.

**A.**—By the "Married Women's Property Act, 1882" (45 & 46 Vict. c. 75, s. 5), she may dispose of as her separate estate any wages, earnings, money, and property accruing to her after that Act.

**Q.**—Can a married woman ever, and when, enter into a contract which will bind her?

**A.**—By the Divorce Act (20 & 21 Vict. c. 85), it is provided that in all cases of judicial separation a wife is to be considered as a *feme sole*, and may be sued in any civil proceeding. So (under the same Act) if she is deserted by her husband, and obtains a protecting order, she is liable as a *feme sole*. Or, where the legal existence of the husband is considered as suspended or extinguished, that is, when he is dead in law, as when in penal servitude, the wife may contract so as to make herself personally responsible. Or if the husband has not been heard of for seven years, and therefore considered legally dead, the wife will be *prima facie* liable, or if she carries on trade under the custom of the city of London: (see Chit. Cont. 174, *et seq.*, 11th edit.) And now by the Married Women's Property Act, 1882, her contracts bind her separate property unless the contrary be shown.

**Q.**—Can a married woman maintain an action alone under any and what circumstances?

**A.**—Yes; by the Married Women's Property Act, 1882. A married woman to the extent of her separate property can now sue and be sued as a *feme sole*.

**Q.**—In what cases must you join husband and wife in an action?

**A.**—In all actions brought to recover the *choses in action* of a wife married before 1st January, 1883, which accrued to her before marriage. For causes of action against a woman *dum sola*, or for torts by the wife, when the husband is sought to be made liable, both must be joined in the action: (2nd edit.; Sm. Act. 41, 2nd edit., by Foulkes; see Ord. XVI., r. 16.)

**Q.**—If a wife, having separate estate, during coverture contracts a debt for clothes, and her husband afterwards dies, is the wife's separate estate liable for the debt of the husband's estate, he being insolvent?

**A.**—The wife's separate estate will now be liable unless it be shown that she did not intend to charge it: (1882 Act, s. 1 (3).)

**Q.**—What is the law as to a husband being liable for his wife's debts contracted before marriage?

**A.**—The liability of the husband upon a contract entered into by his wife before coverture is conditional; for although by the common law *during the marriage* he was liable jointly with her upon all her contracts made *dum sola*, how improvident soever they might have been, and although he might have received no fortune with her; yet he could not be sued *alone*, even upon a subsequent express promise by himself, unless there were some new consideration for the same. After her death he was only liable as her administrator in the event of his administering to *choses*



in action belonging to her; by 33 & 34 Vict. c. 93, s. 12, if married after the 9th August, 1870, and before 30th July, 1874, the husband is not liable for his wife's debts contracted before the marriage. If married after 30th July, 1874 (and before 1883) by 37 & 38 Vict. c. 50, he is liable to the extent that assets of his wife may, or might have come to his hands. If married after 1882, by 45 & 46 Vict. c. 75, s. 14, he is liable to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife.

*Q.*—When can the husband be sued alone for his wife's debts contracted *dum sola*?

*A.*—When he has charged himself in writing for valuable consideration with her debts *dum sola*: (*Mitcheson v. Hewson*, 7 T. R. 348; *Eastwood v. Kenyon*, 11 A. & E. 438; Pat. & Mac. Pr. 646.) So, if he administer in respect of her *choses in action*, not reduced into possession during coverture, he may be sued alone to the amount recovered; so if before marriage the wife was a lessee, an action for rent may be brought against the husband alone: (Com. Dig. tit. "Baron and Feme.") By sect. 12 of the 33 & 34 Vict. c. 93, a husband shall not, by reason of any marriage after the commencement of the Act (9th August, 1870), be liable for the debts of his wife contracted before marriage; but this is modified by 37 & 38 Vict. c. 50, with respect to marriages after 30th July, 1874, and by 45 & 46 Vict. c. 75, s. 14, with respect to marriages after 1882, as above stated.

*Q.*—If A. and B. contract to sell goods to C., and A. becomes bankrupt, who must sue C. for the price of the goods?

*A.*—The Court of Bankruptcy may authorise the trustee in bankruptcy to sue C. in his own name and that of the remaining partner (B.) for the price of the goods, and any release by B. will be void. But B. is to have notice of the application, and may oppose it, and the court may order that he shall receive his proper share of the proceeds; and if he claims no benefit in the matter, he is to be indemnified against costs: (46 & 47 Vict. c. 52, s. 113, and by sect. 114, B. may sue alone on the contract.)

*Q.*—For what damages are hundredors liable, and what are the necessary steps to be taken before a writ is issued, and against whom should it issue?

*A.*—Hundredors are now only liable for damages done by rioters *feloniously*. If the damage exceed 30*l.*, an action may be brought within three calendar months. Prior to bringing the action the plaintiff, or his servant having the care of the property injured, must, within seven days after the commission of the offence, go before some near resident justice, and state on oath the names of the offenders, and submit to an examination, and enter into a recognisance to prosecute. The process is the same as in ordinary cases; it is directed to "the men inhabiting within the hundred of \_\_\_\_\_, in the county of \_\_\_\_\_," or other dislike trict generally, and not against any individuals by name. The writ is served on the high constable (if one), otherwise on the chief constable or chief officer of police: (32 & 33 Vict. c. 47, s. 5, and Ord. IX., r. 8.) If the damage done does not exceed 30*l.*, no action can be brought, but the

proceeding is summary before justices at a special petty session: (see 7 & 8 Geo. 4, c. 31; Sm. Act. 40, 2nd edit., by Foulkes.)

**Q.**—If a beneficed clergyman incur debts, is there any, and what mode of obtaining payment out of the proceeds of the living?

**A.**—Yes; bring an action and obtain a judgment; and if on suing out a *fi. fa.* the sheriff returns that the defendant is a beneficed clerk, and has no lay fee in his county, a writ called a *fi. fa. de bonis ecclesiasticis*, may be issued to the bishop of the diocese, whose duty thereupon is to appoint sequestrators, who take the tithes and other profits of the benefice towards satisfaction of the execution-creditor's demand: (see Sm. Act. 181, 2nd edit. by Foulkes.)

**Q.**—What is the meaning of suing in *formâ pauperis*, and what is requisite in order to be allowed to do so?

**A.**—The meaning is suing *in the form of a pauper*. To do so the person must obtain a barrister's certificate (on a case being laid before him) that he has a good cause of action; and he or his solicitor must make an affidavit that the case contained a full and true statement of all the material facts, to the best of his knowledge and belief, and that he is not worth 25*l.* except his wearing apparel and the matter in question: (Order XVI, pt. IV.)

#### PROCEEDINGS IN AN ACTION.

**Question.**—Set forth the ordinary proceedings in an action which is defended, from its commencement to its termination.

**Answer.**—An action is commenced by writ of summons, a copy of which is served on the defendant, who appears thereto within eight days from service. The pleadings then commence: the plaintiff delivers statement of claim within six weeks, the defendant within ten days delivers his defence, and the plaintiff within three weeks must deliver his reply. No subsequent pleading other than a joinder of issue can be delivered without leave of a court or judge, and such subsequent pleading must be delivered within four days of previous pleading unless otherwise ordered. Interrogatories may be delivered by either party without leave before the close of the pleadings in cases of fraud or breach of trust, and in other cases by leave, on deposit of 5*l.* Notice of trial is then given, and the cause entered, and two copies of the pleadings left for the judge; each party then gets up his evidence, gives notice to inspect, and admit, and to produce, subpoenas his witnesses, and delivers his brief, and the cause is then tried in due course. After the verdict, if the judge does not direct judgment to be entered for either party, the successful party moves for judgment, enters judgment, taxes his costs, and, if necessary, enforces his judgment by execution.

There are also frequently various other interlocutory proceedings depending on the particular circumstances of the case, which it is unnecessary to enter into here.

#### WARRANT OF ATTORNEY, COGNOVIT, AND BILLS OF SALE.

**Question.**—What is the difference between a warrant of attorney and a *cognovit*?

*Answer.*—A warrant of attorney is a written authority (generally under seal, as it contains a power to give a release of errors, to one or more attorneys to appear for the party executing it in some court, and suffer judgment to pass in an action brought or to be brought against him. A *cognovit* is a written confession of an *existing* action. But it need not be under seal. So the former should always be stamped, the latter only in a few cases: (Chit. Arch. 755, 762, 13th edit.)

*Q.*—What proceedings are necessary to render a *cognovit* or a warrant of attorney a valid instrument? (*a*)

*A.*—It must be executed in the presence of a solicitor of the High Court, on behalf of the person executing it, expressly named by him, and attending at his request to inform him of its nature and effect, before it is executed, which solicitor must subscribe his name as a witness to the execution, and thereby declare himself to be solicitor for the person executing the same, and state that he subscribes as such solicitor: (32 & 33 Vict. c. 62, s. 24.)

So it, or a true copy thereof, with an affidavit of the time of execution, must be filed in the office of the Queen's Bench Division of the High Court, within twenty-one days next after execution, or it is deemed fraudulent and void, and if given subject to any defeasance or condition, such defeasance or condition shall be written in the same paper or parchment with the warrant or *cognovit* before the filing thereof: (s. 26.)

*Q.*—Give the form of attestation of a warrant of attorney.

*A.*—The form runs thus: Signed, sealed, and delivered by the above-named O. D., in the presence of me, the undersigned W. H. And I hereby declare myself to be solicitor for the said O. D., and that I subscribe this attestation as such solicitor: (see Pat. & Mac. Pr. 1003.)

*Q.*—When does a *cognovit* require to be stamped?

*A.*—When it contains terms of agreement to the amount of 5*l.* and upwards, as if the amount is to be paid by instalments: (Chit. Cont. 119, 11th edit.; Chit. Arch. 757, 13th edit.)

*Q.*—Is a joint warrant of attorney given by an infant and another binding upon both parties? (*b*)

*A.*—No; the court will set aside the warrant of attorney or judgment as to the infant, but will allow it to be enforced as to the other defendant. The court will, however, require the infancy to be made out by clear and independent evidence: (Chit. Arch. 760, 13th edit.)

*Q.*—What is the advantage of filing a *cognovit* "under the statute," and within what period must it be so filed?

*A.*—Unless filed it is deemed fraudulent and void. This must be done within the time before named: (Chit. Arch. 757, 13th edit.; 32 & 33 Vict. c. 62, s. 26, *ante*.)

*Q.*—A warrant of attorney, dated 21st July, 1860, authorised judgment to be entered up "as of Trinity Term last, Michaelmas Term next, or of

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(*a*) This question is also put thus: When a party gives a warrant of attorney, by whom must it be attested, and what must the attestation state?

(*b*) Also asked thus: Can an infant execute a *cognovit*?

any subsequent term." Judgment was signed in August; was this judgment regular?

A.—No; the judgment not being entered up in a term, as authorised by the warrant. The judgment must be signed in strict pursuance of the warrant; (see Chit. Arch. 725, 13th edit.)

Q.—A warrant of attorney to confess a judgment for 1000*l.* having been given by two parties jointly (and not jointly and severally) one of them dies before judgment is entered up; can the party to whom the warrant of attorney was given enter up judgment against the survivor?

A.—No; the court will not, as a rule, allow judgment to be entered up against the survivor: (Chit. Arch. 776, 13th edit.)

Q.—Where a judge's order is made by consent, given by any defendant in any personal action, authorising judgment to be entered up, and execution issued, what is necessary to be done with such order, so as to prevent the same, and the proceedings under it, from becoming null and void?

A.—The order, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the defendant, must be filed with the proper officer of the Queen's Bench within twenty-one days after the making of such order: (32 & 33 Vict. c. 62, s. 27.)

Q.—What are the requisites to the validity of an ordinary bill of sale?

A.—In addition to the general rules of contract law an ordinary bill of sale (a) which term means any assurance or power to take possession of personal chattels remaining in the possession, or apparent possession of the grantor, must be made: (1) In consideration of not less than 80*l.*; (2) In accordance with the schedule to the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43; *Ib.*, sect. 9); (3) It must set forth the true consideration; (4) It must be duly attested by one or more credible witnesses; and (5) duly registered within seven days, or if made out of England within seven clear days after the time which in the ordinary course of post it would arrive in England if posted immediately after execution: (*Ib.*, s. 8.) Neglect of any of these provisions will render the bill of sale void. It can also only have effect as against creditors in respect of the personal chattels, specifically described in the schedule thereto, and an assignment in it of after acquired property will likewise not be good as against them: (*Ib.*, ss. 4, 5.)

Q.—What alterations in the law were made by the Act 41 & 42 Vict. c. 31?

A.—The following were the principal:

"Personal chattels" to include fixtures when separately assigned or charged, but not fixtures (except trade machinery) when assigned with the premises, trade machinery, or personal chattels, but not the fixed motive power, or steam, gas, or water pipes.

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(a) The Act of 1882 does not apply to bills of sale given otherwise than for the security of payment of money. Registration and attestation of such documents must be in accordance with the Act of 1878. Nor does the Act apply to any debentures issued by any mortgage loan or other incorporated company, and secured upon the capital stock, or goods, chattels, and effects of such company: (45 & 46 Vict. c. 43, s. 17.)

Fixtures and growing crops not to be deemed separately assigned when the land passes by the same instrument.

Bills of sale to be registered within *seven* days and set forth the true consideration, and be executed in the presence of a solicitor, and the attestation to state that he explained the nature of it to the grantor.

A subsequent bill of sale given for the same debt, or on the same goods, to be void, unless for the correction of a manifest error.

Registration to take the goods out of the order and disposition clause, but formal possession not sufficient.

**Q.**—What further alterations were made by the Act 45 & 46 Vict. c. 43?

**A.**—This Act makes absolutely void all bills of sale given by way of security for the payment of money not in accordance with the form in the schedule, or given for a consideration under 30*l.*, and also void as against creditors in respect of after-acquired property, and in respect of chattels not mentioned in the schedule to the bill. Power to seize is only to arise in certain events, and registration is to be certified to the County Courts.

**Q.**—What are the necessary facts to be sworn to in an affidavit filed with a bill of sale pursuant to the above statute?

**A.**—They are the following: The time when the bill of sale was given or made; its due attestation and execution; a description of the residence and occupation of the person making or giving the same; or in case it is made or given by a person in execution, then a description of the residence and occupation of the person against whom the *process issued*, and a description of every attesting witness to the bill of sale. (a)

**Q.**—How is registration effected?

**A.**—The bill, with every schedule, and a true copy of the bill and schedule, and of every attestation of the execution of such bill, together with such affidavit, must be presented to and the said copy and affidavit filed with the registrar of bills of sale within seven clear days or such enlarged time as aforesaid: (41 & 42 Vict. c. 31, s. 10.) A judge may on terms order that the omission to register within the time, or that the misstatement of the name, residence, or occupation of any person may be rectified by extending the time or allowing the entry in the register to be amended, if satisfied that such omission was accidental or due to inadvertence: (*Ib.*, s. 14.)

**Q.**—When does an assignment of fixtures require registration?

**A.**—An assurance of fixtures or of growing crops need only be registered when they are separately assigned or charged. Registration is unnecessary if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed is also conveyed or assigned to the same person or persons; but any mode of disposition of trade machinery by the owner thereof, which would be a bill of sale as to any other personal chattels, will be deemed to be a bill of sale within the Act and require registration: (41 & 42 Vict. c. 31, ss. 5, 7.)

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(a) These formalities have always been very strictly construed by the courts, and great care should be taken that nothing be omitted: (see *Pickards v. Bretts*, 1 L. T. Rep. N. S. 45; *Beales v. Tennant*, *ib.* 295; *Re Pitman Hams*, *ib.* 467.)

**Q.**—Can the grantee on taking possession under a bill of sale at once remove the goods, and what right has the grantor to apply to the court on seizure ?

**A.**—All personal chattels seized under a bill of sale given as security for money shall remain on the premises where they were so seized or taken possession of until after the expiration of five clear days from the seizure (45 & 46 Vict. c. 43, s. 13); and the grantor within that period may apply to the High Court, which, if satisfied that by payment of money or otherwise the cause of seizure no longer exists, may restrain the grantee from removing or selling the chattels, or make such other order as may seem just: (*Ib.*, s. 7.)

**Q.**—If a mortgagor attorns tenant to the mortgagee, would the mortgage require registration ?

**A.**—By the 41 & 42 Vict. c. 31, s. 6, every attornment, instrument, or agreement not being a mining lease, whereby a power of distress is given or agreed to be given as security for a debt, and whereby any rent is reserved, is to be deemed a bill of sale and must be registered accordingly; but this section is not to extend to any mortgage of any estate or interest in land which the mortgagee being in possession shall have demised to the mortgagor as his tenant at a fair and reasonable rent. The effect of this section seems to be that, if the attornment clause is contained in a mortgage deed, the instrument need not be registered if a fair and reasonable rent is reserved, but that otherwise registration is necessary: (see Wilson's Bills of Sale Act, 2nd edit., 47.)

**Q.**—What by the Bills of Sale Act, 1882, are the only contingencies on which the chattels comprised in a bill of sale can be seized ?

**A.**—(1) Default in payment at the specified time or in performance of covenant or agreement contained in the bill of sale and necessary for maintaining the security.

(2) Bankruptcy of grantor or suffering goods to be distrained for rent, rates, or taxes.

(3) Fraudulent removal of the goods.

(4) Neglect of grantee without reasonable excuse, on demand in writing, to produce to grantor his last receipts for rent, rates, and taxes.

(5) Execution levied on the goods under any judgment at law: (45 & 46 Vict. c. 43, s. 7.)

**Q.**—What rights are paramount to a registered bill of sale ?

**A.**—(1) Landlord's right of distress and goods liable to distress under a warrant for the recovery of taxes and poor and other parochial rates: (*Ib.*, s. 14.)

(2) A prior registered bill of sale has priority.

(3) Rights of creditors under 13 Eliz. c. 5.

(4) Rights of creditors if bill of sale is an act of bankruptcy.

**Q.**—One man makes a settlement of household furniture previous to and in consideration of his marriage; another makes a like settlement after his marriage. Do either and which of these require to be registered as a bill of sale ?

**A.**—The settlement made before marriage does not require registration,



as marriage settlements are exempt from the operation of the Bills of Sale Act ; but a settlement made after marriage, unless in pursuance of articles made previously, must be registered.

*Q.*—What transactions are void as against creditors within the meaning of the statute of Elizabeth as to fraudulent gifts and conveyances of chattels and lands ?

*A.*—All gifts and conveyances of chattels and lands made for the purpose of defeating and delaying creditors are void as against them, unless made upon a valuable consideration and *bond fide* to some person without notice of the fraud : (see 13 Eliz. c. 5 ; *Twyne's case*, 1 Sm. L. C. 1 *et seq.*)

### ACTION FOR RECOVERY OF LAND.

*Question.*—What was an action of ejectment ?

*Answer.*—Ejectment originated as far back as the reign of Edw. 3, and was, prior to the 15 & 16 Vict. c. 76, an anomalous and fictitious proceeding, and termed a mixed action. By the above Act, however, the action of ejectment was wholly remodelled, and was brought to recover the possession of land only : (see Sm. Act. 28, 2nd edit. by Foulkes.) (*a*) It is now called an action for recovery of land, and by Order II., r. 3, is commenced by writ, the same as any other action ; but by Order XVIII., r. 2, no other cause of action can be joined with it except by leave of the court or a judge, other than claims in respect of mesne profits or arrears of rent or double value in respect of the premises claimed or any part thereof, and damages for breach of contract under which the same or any part thereof are held, or for any wrong or injury to them. (*b*)

*Q.*—In what material respects does an action for the recovery of land differ from an action in ejectment before the Judicature Act ?

*A.*—In the old action of ejectment the defendant had sixteen days to appear, the writ was in force for three months only, the venue was local, and there were no pleadings, the plaintiff could only recover on a legal title. In an action to recover land, the defendant has only eight days to appear. Claims for mesne profits, arrears of rent and damages for breach of contract in connection with the property, may be joined with it. The writ is in force twelve months. The pleadings are the same as in other actions. Local venue is abolished. A mortgagor plaintiff is not restricted to his legal title to recover, and execution now issues immediately.

*Q.*—In what cases is this action usually brought ?

*A.*—In the following : (1.) By one person seeking to recover the possession of land from another. (2.) By a landlord against his tenant. (3.) By a mortgagee against the mortgagor, or any of the mortgagor's tenants who became such after the mortgage : (see Sm. Act. 402, 10th edit.)

*Q.*—What essential right must the plaintiff possess as to the land

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(*a*) In action of ejectment by a landlord against a tenant, under sect. 214, however, after proof of his right to recover possession, he might go into evidence of mesne profits : see Sm. Act. 424, 10th edit.)

(*b*) See *Whetstone v. Davis* (Oharley's Pract. Cas., p. 92).



sought to be recovered, and what step must be taken before action in the cases respectively of a tenancy from year to year, and a tenancy at will?

A.—The plaintiff need not now in all cases have a legal title, as in the case of a mortgagor entitled to possession where no notice has been given by the mortgagee: (1873 Act, s. 25, sub-s. 5.) Before it can be brought against a yearly tenant six months' notice must be given, or, under the Agricultural Tenancies Act, twelve months, to expire at the end of the current year's tenancy; against the tenant at will, however, a simple demand of possession will found a right of action: (Broom's Com. Law, 753 *et seq.*, 3rd edit.)

Q.—Can a mortgagor of land under any, and, if any, what, circumstances sue in his own name only for possession of such land, or for damages in respect of any trespass thereto?

A.—If he is entitled for the time being to possession or receipt of the rents and profits, and no notice to enter into possession or receipt of such rents and profits has been given by the mortgagee, he may sue in his own name for the recovery of possession, or of the rents and profits, or to prevent or recover damages in respect of any trespass or other wrong relating thereto, unless the cause of action arises upon a lease or other contract made by him jointly with any other person: (1873 Jud. Act, s. 25, sub-s. 5.)

Q.—Is an equitable title sufficient to found this action?

A.—It is in the case of a mortgagor, as above stated; but an equitable defence can now be pleaded in an action of ejectment: (Ord. XXI., r. 21.)

Q.—Within what period can the action be brought?

A.—Within twelve years next after the time at which the right to bring such action accrued; unless the party entitled to bring it is under disability, for then he is allowed six years after the disability ceases. But no action can be brought after thirty years have elapsed from the time the right of action first accrued: (37 & 38 Vict. c. 57.)

Q.—What is the first proceeding in the action? and how, on whom, and where is it to be served?

A.—A writ is now issued the same as in other actions, the indorsement showing the nature of the claim, and the service is similar, but in case of vacant possession, and where it cannot otherwise be effected, it is made by posting a copy of the writ upon the door of the dwelling-house, or other conspicuous part of the property, but an order for substituted or other service, or for notice in lieu of service, may now be made: (Ord. IX., rr. 2, 9; *Crane v. Jullion*, 2 Charley's Cas. (Court), 209.)

Q.—Under what circumstances can a possession be treated as "vacant" for the purpose of service of the writ? State the mode of service proper in such a case.

A.—A mere discontinuance to occupy will not constitute a vacant possession; the possession must be entirely abandoned, or the premises be incapable of occupation, as where they are in an unfinished state: (*Doe d. Newman v. Roe*, 2 Dowl. 399; *Doe d. Schovell v. Roe*, 3 Dowl. 691.)

In the case of vacant possession, service may be effected by posting a copy of the writ upon the door of the dwelling-house, or other conspicuous part of the property (Ord. IX., r. 9); but in case of default of appearance, an order to enter judgment must now be obtained: (Bitt. Pract. Cas. XX.)

Q.—Under what statutory obligation is a tenant, on whom the writ has been served, to give notice thereof to his landlord?

A.—He must forthwith give notice thereof to his landlord, or his bailiff or receiver, under penalty of forfeiting three years' improved rack-rent of the premises holden by the tenant, to be recovered by action: (see 15 & 16 Vict. c. 76, s. 209.)

Q.—When such action is brought against a tenant in possession, what is required to enable a landlord to come in and defend?

A.—He must make an affidavit showing that he is in possession of the land by his tenant, and apply to the court or a judge for leave to appear and defend; and in his appearance state that he appears as landlord: (Ord. XII., rr. 25, 26.)

Q.—Where a party in such action wishes to defend as devisee, or mortgagee, what steps should he take to be let in and defend?

A.—He must take the steps detailed in the preceding answer. For the order empowers any other person not named in the writ to come in and defend, on obtaining leave. Where a person is neither named in the writ, nor in possession of the property, either by himself or his tenant, he cannot obtain leave to defend: (*Whitworth v. Humphries*, 1 L. T. Rep. N. S. 301.)

Q.—How many days has a defendant to appear in such actions?

A.—Formerly, he had sixteen days after service of the writ to appear and defend the possession of the property sued for; now he has only eight, as in other actions.

Q.—What is the mode by which a defendant in such action may, if he think proper, limit his defence to part of the premises sought to be recovered?

A.—By describing that part with reasonable certainty in his memorandum of appearance, or in a notice intituled in the action, and signed by the party or his solicitor, and serving such notice within four days after appearance: (Ord. XII., r. 28.) Where there are several defendants, and the plaintiff succeeds, each of the defendants, although defending only for *part* of the premises claimed, is liable for the whole of the plaintiff's costs: (see *Johnson et al. v. Mills et al, Re Foot*, L. Rep. 3 C. P. 22.)

Q.—Where must the venue be laid in such action?

A.—Formerly, the venue was local, but local venue is now abolished, except where otherwise provided by statute: (Ord. XXXVI., r. 1.)

Q.—What are the steps to be taken in such action, before the cause is at issue? (a)

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(a) Also asked thus: Are there any pleadings in an action of ejectment, and how is the issue made up?

A.—Formerly there were no pleadings; but now they are the same as in other actions. The defendant, if in possession, need plead only that he is in possession unless his defence depends on equitable grounds, when he must plead his title: (Ord. XXI., r. 21.)

Q.—In an action for recovery of freehold land, how is a will affecting the title proved?

A.—Formerly, the original will must always have been produced, and proved by the attesting witnesses: (Pow. Ev. 274.) Now, however, the 20 & 21 Vict. c. 77, provides that, in any action where it is wished to establish a devise of real estate, the original will need not be produced; but the plaintiff may give the defendant ten days' notice before the trial that he intends thereat to give in evidence, as proof of the devise, probate of the will, &c., which probate, &c., will be *sufficient* unless the defendant, within four days after receiving the plaintiff's notice, give the plaintiff a notice that he intends to dispute the validity of the devise: (s. 64.) If the will is proved in solemn form probate is conclusive evidence: (s. 62.) See *ante*, note (a), p. 112.

Q.—In what cases could the common law courts relieve tenants from forfeiture in actions of ejectment under the Common Law Procedure Act, 1860?

A.—In case of ejectment for a forfeiture brought for non-payment of rent, the courts of common law, or a judge thereof, could, under this Act, upon a rule or summons, give relief in a summary way within the same time, and subject to the same terms and conditions as the Court of Chancery. Also upon ejectment for forfeiture for breach of a covenant to insure against damage by fire, the court or judge might, in like manner, give the same relief as the Court of Chancery gave under the 22 & 23 Vict. c. 35: (see 23 & 24 Vict. c. 126, ss. 1—11.)

Q.—In an action for recovery of land the defendant obtains a verdict. Is the plaintiff's claim to the premises sought to be recovered, barred by such verdict? Or can the unsuccessful party re-try the same question as often as he pleases without leave of the court?

A.—A verdict and judgment in ejectment were never conclusive as to the title, and the unsuccessful party might bring another action of ejectment to try his right if he thought proper: (see *Taylor v. Horde*, Sm. L. C. vol. 2.) (a)

Q.—When such action is brought on a proviso for re-entry on a breach of covenant to repair, give an instance of the waiver of the forfeiture.

A.—An instance would be the acceptance of rent by the landlord after he knew of the breach of covenant to repair.

Q.—When a plaintiff has recovered verdict in such action, how does he recover possession?

A.—After entering the judgment, execution now issues at once for recovery of possession of the property and for costs. The plaintiff recovers

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(a) The reason of this is that the judgment in ejectment is only for the recovery of possession, without prejudice to the right. A person may have a right at one time and not at another: (see *Taylor v. Horde*, *sup.*) But, of course, ejectment is founded on title.

possession of the property by a writ of possession. It is directed to the sheriff: (Ord. XLVII., r. 1.) (a)

Q.—Where judgment in such action is entered for want of appearance, is the claimant entitled to costs?

A.—Plaintiff is now entitled to costs, as in any other action, and he may have either one writ or separate writs of execution for possession and for their recovery: (Ord. XLVII., r. 3.)

Q.—Describe the usual proceedings in this action.

A.—The action is now commenced by writ, directed to the persons in possession by name, and the indorsement of claim briefly describes the property claimed. It should be served as in other actions, or in case of vacant possession it should be posted on the property as stated *ante*, p. 155. The defendant has eight days to appear. After appearance, which may be to the whole or part of the premises, the plaintiff delivers his statement of claim, after which the defendant puts in his defence, merely stating that he is in possession, unless it is an equitable one; after which plaintiff replies, and issue is joined, notice of trial given, and cause entered. (b) The cause is tried in the same way as an ordinary cause; verdict being given, judgment entered, costs taxed, and execution issued: (see *supra*.)

Q.—At whose suit must an action for mesne profits be brought, and against whom?

A.—The action must be brought in the name of the party entitled to possession, and may now be joined in his action for recovery of the land: (see Ord. XVIII., r. 2.)

Q.—What is the plaintiff entitled to recover in such action?

A.—Only six years' arrears of the annual income or rent can be recovered (unless it is brought against a tenant who holds under a lease under a seal; when twenty years' arrears can be recovered). However, the jury in estimating the damages are not confined to the mere rent or annual value of the premises; but may give such extra damages as they think fit as a compensation for the plaintiff's trouble and costs: (Sm. Act. 429, 10th edit.)

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## DISTRESS.

**Question.**—What is the meaning of a distress?

**Answer.**—A distress in law is the taking of a personal chattel out of the possession of the wrong-doer into the custody of the person who is injured, in order to procure a satisfaction of the wrong done: (3 St. C. 247, 8th edit.)

Q.—For what are distresses usually taken?

A.—For non-payment of rent, for cattle *damage feasant*, and under

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(a) When the judgment is that a person therein named is directed to deliver up possession of any lands to some other person, an affidavit of service of such judgment and of disobeyal thereof must be filed before execution can issue: (Ord. XLVII., r. 2.)

(b) Interrogatories may now be delivered in it: (*Lyell v. Kennedy*, 52 L. J. 385, H. L.)

various Acts of Parliament for tithe, rates, and taxes : (see 3 St. C. 247-260, 8th edit.)

**Q.**—What may be distrained, and what things are privileged from distress for rent ?

**A.**—It is a general rule that all chattels personal, found upon the premises, as well the goods of strangers as of the tenant, are liable to be distrained, unless particularly exempted. But by the 34 & 35 Vict. c. 79, the goods of lodgers are protected against distresses for arrears of rent due to the superior landlord from his immediate tenant (*post*, p. 161). The following things are privileged from distress :

1. Animals *feræ naturæ*.
2. Whatever is in the personal use of a man, as an axe with which he is cutting wood, or a horse which he is riding. But horses drawing a cart may (cart and all) be distrained for rent in arrear.
3. Things delivered to a person to be carried, wrought, or managed in the way of his trade, as cloth at a tailor's.
4. Things in the custody of the law, such as property already taken *damage feasant*, or in execution.
5. Loose money.
6. Everything which cannot be returned in as good a condition as when distrained, as milk, fruit, and the like.
7. Things fixed to the freehold.

Besides the preceding articles which are absolutely privileged the following are privileged *sub modo* : beasts of the plough and sheep, and instruments of husbandry ; and the instruments of a man's trade or profession, as the axe of a carpenter, the books of a scholar, and the like, all which are exempt, provided there be other sufficient distress on the premises ; and by the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61, s. 45), live stock of another taken in to feed is exempt if other sufficient distress is on the premises, and if not is only liable for amount due from their owner to the tenant ; (see 3 St. C. 249 *et seq.*, 8th edit. ; Arch. L. & T. 111 *et seq.*, 2nd edit.)

**Q.**—How are distresses made ?

**A.**—A distress for rent is made by the landlord or his agent entering upon some part of the demised premises by day, and seizing some portion of the goods in the name of the whole, or of so much as may be necessary. The whole amount should be distrained for at once, unless there is not sufficient distress on the premises. When the distress is taken, the things distrained must be impounded, and written notice of the cause of distress given to the tenant : (a) (see St. C. 254 *et seq.*, 8th edit. ; Arch. L. & T. 125 *et seq.*, 2nd edit.)

**Q.**—At what time can a distress be made ?

**A.**—A distress for rent in arrear must be made by day, and for this purpose day commences at sunrise and ends at sunset : (*Tutton v. Dark*, 2 L. T. Rep. N. S. 361.) But a distress *damage feasant* may be made by night, lest the cattle should escape : (3 St. C. *sup.*)

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(a) By the Agricultural Holdings Act, 1883, s. 44, a distress with respect to holdings under that Act can only be made within a year of the rent falling due or from the customary quarter or half year when paid.

**Q.**—What do you mean by an Englishman's house being his castle? By whom and under what circumstances may his outer door be broken open?

**A.**—It means that the immunity of a man's house is so sacred it never can be violated with impunity. For this reason no outward door can, as a rule, be broken open to execute any civil process, though in criminal cases the public safety supersedes the private: (St. C., vol. 4, p. 342, 8th edit.) But where goods have been fraudulently removed and locked up to avoid a distress, it may be done as stated *infra*, and also in case of distress for the Queen's taxes; or by an ejected bailiff to re-enter, and in criminal cases.

**Q.**—Can an outer, or any, or what other, door be broken open in order to make a distress?

**A.**—An outer door cannot be broken open for this purpose; but when the party making the distress is in the house, an inner door may be broken open: (*Semayne's case*, 1 Sm. L. C. 121.) And where goods have been fraudulently removed and locked up to prevent a distress, the landlord may, within thirty days after, by the assistance of the peace officer of the parish, and oath having been made before a justice, in case it is a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein, break open, in the daytime, the place where the goods are: (11 Geo. 2, c. 19.)

**Q.**—Can goods removed for the purpose of avoiding a distress be seized and sold, and within what time?

**A.**—The landlord or any person empowered by him may within the space of thirty days take and seize them as a distress wherever they may be found, provided that they have not before such seizure been sold *bond fide* and for a valuable consideration; all persons assisting such fraudulent conveyance forfeit double their value to the landlord: (11 Geo. 2, c. 19, ss. 1, 2.) The statute only applies when the removal took place on or after the day when the rent became due: (*Band v. Vaughan*, 1 Bing. N. C. 767.)

**Q.**—Must a bailiff have a written authority to distrain?

**A.**—This is not absolutely necessary, but it is advisable, and one is generally given, called a warrant of distress: (see Arch. L. & T. 126, &c., 2nd edit.)

**Q.**—What do you understand by the expression "cattle *levant* and *couchant*?"

**A.**—It literally means *rising up* and *lying down*, but it is chiefly used in respect of distresses. Thus, if lands were not sufficiently fenced, so as to keep out cattle, if the landlord or tenant is bound to fence, the landlord or tenant cannot distrain them till they have been *levant* and *couchant* on the lands; that is, have been long enough there to have laid down and risen up to feed, which, in general, is held to be one night at least: (see further St. C. 251, 8th edit.)

**Q.**—In what cases may cattle be impounded; and, if impounded for an excessive sum, what are the remedies, and against the party impounding or against the pound keeper?



**A.**—As before stated, cattle may be impounded on a distress for rent in arrear or *damage feasant*. An action (formerly on the case) is the proper remedy for an excessive distress: (Arch. L. & T. 296, 2nd edit.) The action must be brought against the impounder, and not against the pound keeper, for he is not liable unless he has exceeded his duty, and assented to the trespass; for a pound keeper is bound to receive everything offered to his custody: (see Selw. Nisi Prius, 685, 11th edit.)

**Q.**—Can goods, the property of a guest at an inn, be taken in distress for rent due for the premises? Give the reason for your answer.

**A.**—Such goods are privileged from distress as being in the custody of the innkeeper in the course of his trade. See *Crosier v. Tomkinson*, (2 Ld. Ken. 439), which expressly decides this point.

**Q.**—Are the goods of a lodger distrainable for arrears of rent due to the superior landlord by his immediate tenant? What alteration in the law on this point has been recently made?

**A.**—They are distrainable, but the lodger may take advantage of the Act, 34 & 35 Vict. c. 79.

By sect. 1 of this Act a lodger may serve on the superior landlord a declaration in writing, setting forth that the immediate tenant has no right in the goods distrained, and that the same are the property or in the lawful possession of the lodger; and also setting forth what rent is due from the lodger to his immediate landlord, and the lodger may pay the same, or so much as is sufficient, to the superior landlord, whereupon further proceedings upon such distress become illegal. An inventory of the goods referred to must be annexed to the declaration; and see *post*, p. 162.

**Q.**—When a landlord distrains for rent, after what time, and subject to what precautions, can he proceed to sell the goods distrained? (a)

**A.**—The landlord cannot sell the goods until five days next after the distress is taken, and notice of the cause of the distress given. He is not bound to sell immediately on the expiration of the five days, but is allowed by law a reasonable time afterwards for the appraisement and sale. Before the sale, the goods must be appraised: (Arch. L. & T. 133, 2nd edit.; 3 St. C. 259, 8th edit.)

**Q.**—Is the summary remedy of a landlord for rent suspended if he take a note, bill, or bond?

**A.**—No; for the rent is of a higher nature, and the acceptance of a security of an unequal degree is no extinguishment of the claim: (*Harris v. Shipway* and *Ewer v. Lady Clifton*, Bul. N. P. 182.)

**Q.**—Where a landlord grants a mortgage, and afterwards lets the premises by lease, can the mortgagee distrain if the tenant have not attorned to him, or what remedy has he against the tenant; and would the remedy be the same if a lease of the premises had been granted before the mortgage? and, if not, what would be the difference?

**A.**—If the mortgagor lease the mortgaged premises, the mortgagee cannot distrain or sue for rent in arrear unless the tenant has attorned to

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(a) This question is answered by the text: How are distresses disposed of?



him, and then only for rent accruing due after attornment; but he may without notice eject the tenant: (*Keech v. Hall*, 1 Sm. L. C. 292.) If the lease were granted before the mortgage, the mortgagee may, after giving notice to the tenant, distrain for past rent as well as for rent accruing due after notice, he being assignee of the reversion: (*Moss v. Gallimore*, 1 Sm. L. C. 309; Arch. L. & T. 115, 2nd edit.)

Q.—Under the Tithe Commutation Act, to whom is the tithe owner to apply, in the first instance, for his rentcharge; and, if not paid, what proceedings must he adopt, and against whom?

A.—He applies to the tenant in possession. In case of non-payment by the tenant within twenty-one days after the rentcharge has become due, and after ten days' notice, the owner may distrain upon the lands liable for the arrears, and dispose of the distress, when taken, in the same manner as a distress for rent. If the rentcharge is in arrear for forty days, and no sufficient distress can be found on the premises, the owner may have a writ directing the sheriff to assess the arrears, and may afterwards sue out a writ of possession, and keep possession of the premises charged until the arrears and costs are fully satisfied. But no more than two years' arrears can be recovered at any one time, either by the distress or writ of execution: (see 6 & 7 Will. 4, c. 71; 3 St. C. 314, 8th edit.)

Q.—State the principal irregularities in making a distress for rent in respect of which an action would lie?

A.—If the landlord does not comply with the formalities of 2 Will. & M. as to giving notice of distress, and having the goods appraised, or if he sell the goods before the five days have expired, or continue on the premises after the five days allowed by this statute, or work the distress, the tenant may bring an action against his landlord: (Arch. Nisi Prius, 433.) Under the Agricultural Holdings Act, 1883, s. 51, fifteen days are allowed to replevy the goods on request of the tenant or owner of the goods in writing.

It may be stated that where an *irregularity* occurs in taking a distress the distrainer is not now a trespasser *ab initio*, if any rent is justly due (11 Geo. 2, c. 19, s. 19); as was formerly the case: (see *Six Carpenters' case*, 1 Sm. L. C.)

Q.—What is the remedy for a wrongful distress? If goods are illegally distrained for rent, what remedy has the owner of the goods, 1st, where no rent is due? 2nd, where only a small part is due?

A.—Replevin is the usual remedy for an illegal distress, the advantage of which is that the goods are at once returned to the former owner, but an action also lies without doing this; formerly, if no rent were due, trespass would lie, or the tenant might waive the trespass and bring case or trover for the value of the articles taken, or detinue for the things themselves. If some rent were due, case, and not replevin, was the proper remedy (Arch. L. & T. 280 *et seq.*, 2nd edit.); for if a man having a right to distrain for 5*l.* distrain for 500*l.*, a replevin, without making a sufficient tender before impounding, is not the proper remedy: (Wood. L. & T. 792, 10th edit.; *Skeate v. Beale*, 4 Jur. 766, 767.) In the case of an illegal distress on the goods of a lodger, the lodger may apply to a justice of the

peace for an order for the restoration of such goods, and the magistrate or justices hearing the application may make an order for the recovery of the goods or otherwise, and the superior landlord shall also be liable to an action at the suit of the lodger: (34 & 35 Vict. c. 79, s. 2.)

### REPLEVIN.

*Question.*—If a man's goods are distrained for rent which he alleges not to be due, what steps must he take to get them back again, and before whom must he go?

*Answer.*—He should bring an action of replevin. He must first, however, go before the registrar of the County Court of the district in which the distress is taken, and enter into the usual replevin bond, as stated *infra*.

*Q.*—What is a replevin, what is the nature of the action, and what the most usual course of its adoption, and under what circumstances should it be brought in the High Court or County Court respectively?

*A.*—It is one of the remedies given by law when goods are wrongfully taken, and is founded on tort. It is usually used when goods have been wrongfully distrained. It should be brought in the County Court unless the plaintiff is prepared to prove either that the title to some hereditament, market, toll, fair, or franchise is in question, or that the rent or damage exceeds 20*l*. If the plaintiff is so prepared he must sue in the High Court: (Sm. Act. 46, 431 *et seq.*, 10th edit.)

*Q.*—How is the action carried on in the County Court, and how in the court above?

*A.*—In the County Court it is carried on by entering a plaint, and issuing a summons for the defendant's appearance; and on the day appointed for appearance the cause is heard in a summary way, and judgment is given as in other actions in the County Courts; or it may be tried by a jury, if either party wish.

In the High Court the action is now commenced by writ, and the proceedings are the same as in ordinary actions.

But before proceedings are commenced in either court, the plaintiff must enter into a replevin bond, as stated *infra*.

*Q.*—By whom are replevins now granted, and in what court may an action of replevin be commenced?

*A.*—The registrar of the County Court of the district in which any distress subject to replevin is taken, is to approve of replevin bonds, grant replevins, and issue all necessary process in relation thereto, and such process is to be executed by the high bailiff. An action of replevin may be commenced either in the High Court or in the County Court: (19 & 20 Vict. c. 108, s. 63.)(a)

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(a) But if the replevisor wishes to commence his action in the High Court, he must, at the time of replevying, give security to be approved by the registrar, for such an amount as such registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable cost of the

**Q.**—In a replevin suit in the County Court can any other cause of action be joined in the summons?

**A.**—Formerly it could not, but it might now.

**Q.**—How should the defendant proceed to remove an action of replevin into the High Court?

**A.**—By *certiorari*. He is to apply to such court, or to a judge thereof, for such writ, and to give security, to be approved by the master, for an amount not exceeding 150*l.*, conditioned to defend such action with effect, and (unless the replevisor shall discontinue, or not prosecute such action, or become nonsuit therein) to prove that the defendant had good ground for believing either that the title to some hereditament, or to some toll, market, fair, or franchise, was in question, or that the rent or damage in respect of which the distress shall have been taken exceeds 20*l.*: (see 19 & 20 Vict. c. 108, s. 58; Sm. 438, 10th edit.)

**Q.**—Name the various pleadings in an action of replevin.

**A.**—They are the same now as in an ordinary action.

**Q.**—What is the meaning of the term “avowry?”

**A.**—It was the justification plea of the defendant, when he insisted that the goods were lawfully taken by him in his own right: (Sm. *sup.*)

**Q.**—What was the first writ in replevin called?

**A.**—A *replegiari facias*. But by 52 Hen. 3, c. 21, the sheriff was authorised to replevy the goods without writ. And by 9 & 10 Vict. c. 95, ss. 119-121, replevin may be brought in the County Courts without writ; or, as before seen, it may be brought in the High Court, and commenced by an ordinary writ.

**Q.**—Is a defendant in replevin in a different character from a defendant in any other action? and, if so, explain the difference.

**A.**—Yes; he is considered in the light of a plaintiff, and formerly either party might make up the issue, and give notice of trial; and also make up the *Nisi Prius* record and enter it with the associate or judge's marshal for trial: (see Sm. Act. 436, 10th edit.)

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### ARBITRATION.

**Question.**—What are the different modes of submitting a question to arbitration?

**Answer.**—Either by agreement of reference by the parties, or by order

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cause, conditioned to commence an action of replevin against the distrainer in such court, within one week from the date thereof, and to prosecute such action with effect, and without delay, and unless judgment is obtained by default, to prove before such court that he had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, was in question, or that such rent or damage exceeded 20*l.*, and to make return of the goods, if return be adjudged: (see sect. 65.) If the action be commenced in the County Court, the replevisor at the time of replevying gives security, to be approved by the registrar, for such an amount as shall cover the alleged rent or damage, and all costs, conditioned to commence his action of replevin in the County Court of the district in which the distress is taken, within one month after the date of the security, and to prosecute with effect, and to return the goods, if a return be adjudged: (sect. 66; see also Co. C. Rule, 134-138; Sm. Act. 438, 434, 10th edit.)

of the court, divisional court, or judge, before whom the matter is pending, to an official or special referee to report (1873 Act, s. 56), or by s. 57, to try any question or issue of fact, or by a compulsory order of the court or a judge, in matters of mere account, under the 17 & 18 Vict. c. 125, ss. 3-17, the provisions as to which are preserved by the Judicature Act, 1873, s. 59.

**Q.**—To what tribunals, and under what authority, may an action involving matters of account which cannot conveniently be tried by a jury, be referred?

**A.**—By the 17 & 18 Vict. c. 125, power is given, in such cases, to the court or a judge, after a writ issued, on the application of either party, to refer the matter to an arbitrator appointed by the parties, or to an officer of the court. The award or certificate of the arbitrator is enforced by the same process as the finding of a jury: (sect. 3; Sm. Act. 483, 10th edit.) By the 1873 Act, s. 57, the court or judge in such case, without any consent of parties, may order any question of account to be tried before an official referee or a special referee agreed on by the parties. The referee, unless otherwise directed, must proceed *de die in diem*; he has the same powers as a judge, except of commitment, or of enforcing orders: (Ord. XXXVI., rr. 48-51.) (a)

**Q.**—A written contract provides that in case of differences arising between the parties thereto, the same shall be referred to arbitration. Differences do arise, and in respect of which one of the parties commences an action against the other. Can the party against whom such action is brought take any, and what, step to stop the action? Refer to any statute on the subject.

**A.**—By sect. 11 of the C. L. P. Act of 1854 (17 & 18 Vict. c. 125) the court or judge may, on the application of the defendant, after appearance and before putting in statement of defence, and upon being satisfied that there is no sufficient ground why such matters should not be referred to arbitration pursuant to the agreement, and that the defendant was at the time of the action being brought, and still is, ready to do and concur in all acts necessary for having the matters in dispute decided by arbitration, make an order staying all proceedings on such

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(a) If any prolonged examination of documents is required, or any local or scientific investigation which cannot conveniently be made before a jury, or conducted by the court through its other ordinary officers, an action may be ordered to be tried in a similar way (sect. 57). The practice as laid down by the Court of Appeal in the cases of *Longman v. East*, *Pontifex v. Severn*, and *Mallin v. Monico*, appears to be as follows:

A judge has no power to send an action to be tried by an official referee. He can only send all or some of the issues to be tried.

An official referee must not find generally for plaintiff or defendant unless the parties by consent constitute him an arbitrator.

If the issues to be tried depend upon principles susceptible of explanation and open to discussion, those principles should be stated by the referee in his report.

A referee has no power to give judgment.

An official referee is an officer whose only duty is to take evidence, arrive at conclusions like a jury, and report his conclusions and his reasons for them, for the purpose of informing the mind of the court: (see *Law Times*, 29th Dec. 1877, p. 147.)

terms as to costs or otherwise as may be just, but such order may at any time afterwards be discharged or varied as justice may require.

**Q.**—What is the effect of making the agreement a rule of court?

**A.**—By making the agreement a rule of court the award may be enforced by an attachment, or by obtaining a judge's order for payment, on which execution can issue: (see 9 & 10 Will. 3, c. 15, and 1 & 2 Vict. c. 110, s. 18.)

**Q.**—A. brings an action against B. for recovery of a disputed debt; after action brought, the cause is referred to an arbitrator by a judge's order; before award made, A. wishes to revoke the arbitrator's authority. Is he at liberty to do so of his own will, or must he have any, and what, leave?

**A.**—A. cannot revoke the arbitrator's authority without first obtaining leave of the court or a judge; and the arbitrator is to proceed with the reference, and make his award, notwithstanding any revocation that may be made without leave: (see 3 & 4 Will. 4, c. 42, s. 39; Sm. Act. 448, 10th edit.)

**Q.**—If you are dissatisfied with an award, how must you apply to set it aside, and within what time?

**A.**—Before moving to set aside an award, the order or agreement of submission must be made a rule of court. You then apply by motion on notice.

By stat. 17 & 18 Vict. c. 125, s. 9, all applications to set aside any award, made on a compulsory reference under this Act, are to be made within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term.

If the submission has been made a rule of court under stat. 9 & 10 Will. 3, c. 15, application must be made before the last day of the term next after the award, or umpirage thereon, is made and published, to set it aside.

If the reference be by order of *Nisi Prius*, the report of the referee is equivalent to the verdict of a jury (1873 Act, s. 50); and the motion to set it aside must be made within the time allowed for moving for a new trial.

By Order LXIV., r. 14, an application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties.

**Q.**—State the usual grounds for setting aside an award.

**A.**—They are the following: Misconduct of the arbitrator. The award not pursuing the submission. That the arbitrator has exceeded his authority. That the arbitrator has not awarded on all the matters referred to him. That the award is uncertain. That it is inconsistent. By stat. 17 & 18 Vict. c. 125, s. 8, power is given to the court or a judge to remit matters referred, or any of them, to the reconsideration of the arbitrator, in references under this Act: (see *Chit. Arch.* 1355, 13th edit.; Sm. Act. 459, 471, 473, 10th edit.) (a)

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(a) And it has been held that this section extends to references by submission, if made a rule of court: (*Morris v. Morris*, 27 L. T. Rep. 103.) A mistake by the arbitrator as to the legal effect of his finding is no ground for setting aside his award: (*Greenwood v. Brownhill*, 44 L. T. Rep. 47.)

**Q.**—Has an arbitrator the same power to certify as to costs which the judge would have had, if the cause had been tried before him at *Nisi Prius*?

**A.**—Formerly he had not, but a referee under the Judicature Act, 1873, has the same authority as a judge: (Ord. XXXVI., r. 50.)

**Q.**—Where all matters in difference, not in a cause, are referred to arbitration, the costs of the reference to abide the event, and the arbitrator finds partly in favour of each party; can either of them have the costs of the reference?

**A.**—No; each party will have to pay his own costs, even though there be a substantial balance in favour of one: (Sm. Act. 464, n., 10th edit.)

**Q.**—If an award be made on the last day of term, when is the successful party entitled to tax his costs?

**A.**—He may do so on taking up the award, and he is not bound to wait until the time for setting it aside has elapsed: (*O'Toole v. Potts*, 28 L. T. Rep. 248.)

**Q.**—How soon can a plaintiff enforce an award made upon a compulsory reference under the Common Law Procedure Act, 1854, and what course must be pursued for that purpose?

**A.**—The plaintiff may enforce the award by the authority of a judge on such terms as may be reasonable on the expiration of seven days from the time of publication, although the time for moving to set it aside has not elapsed. The award is enforced by the same process as the finding of a jury upon the matter referred; but judgment must be signed before execution can issue: (Sm. Act. 487, 10th edit.)

**Q.**—In what various ways can you enforce an award directing the payment of money or other act, after the submission is made a rule of court?

**A.**—Either by action or by attachment, and, where it is for the payment of money, also by execution. Before an attachment or execution can issue, a copy of the rule, allocatur, and power of attorney if any, and award must be served, and the original shown, and a demand of compliance therewith made, and an order obtained on summons or motion to enforce the award; see Order LII., r. 4: (*Re Phillips and Gill*, Char. Prac. Cas. 157; see Chit. Arch. 1381, 13th edit.; Sm. Act. 754 *et seq.*, 10th edit.)

## OF COUNTY AND OTHER INFERIOR COURTS.

**Question.**—Are the County Courts modern introductions, or are they of any antiquity; how far back does that antiquity extend; and name one or more writers by whom they are mentioned?

**Answer.**—County Courts are of great antiquity; they existed at common law, and are noticed in the laws of Edward the Elder. They are mentioned by Spelman, Finch, and other ancient writers. But the ancient County Court was not a court of record like the present: (see 3 St. C. 284, 8th edit.)

**Q.**—In what cases has the High Court concurrent jurisdiction with the County Courts? State also the limit of the jurisdiction of the latter when title comes in question.

**A.**—In all actions on contract and detinue, save breach of promise of



marriage, for sums from 20*l.* to 50*l.*; and in such actions *ex delicto* (see *ante*) as are within the jurisdiction of the County Court, where the damages to be recovered are from 10*l.* to 50*l.* Also in actions of ejectment where neither the value of the property nor the rent exceeds 20*l.* per annum; and in actions to determine the title to hereditaments, corporeal or incorporeal, to the same amount; and to recover small tenements from tenants at sufferance where the annual value or rent does not exceed 50*l.* (19 & 20 Vict. c. 108, s. 52; 30 & 31 Vict. c. 142, ss. 11, 12; 45 & 46 Vict. c. 57, s. 4), (a) also in certain equity cases under 500*l.* (see *post*).

**Q.**—State the cases in which you are compelled to sue under the County Courts Acts; and how, and where, the suit must be brought; and where must the parties be residing at the time?

**A.**—You must sue in the County Court, except in cases where the High Court has a concurrent or exclusive jurisdiction, as to which see *ante*, or no costs are allowed. (b) The suit is brought by entering a plaint, whereupon a summons is issued and served upon the defendant by the proper officer of the court. The suit is brought in the County Court of the district within which the defendant resides or carries on business at the time of action brought, or by leave of the judge or registrar, in the court within the district of which the defendant dwelt or carried on his business, within six calendar months next before the time of the action brought, or in which the cause of action wholly or in part arose: (see 9 & 10 Vict. c. 95; 13 & 14 Vict. c. 61; 19 & 20 Vict. c. 108; 30 & 31 Vict. c. 142, s. 1.)

**Q.**—In an action in the County Court, where the debt or damage claimed does not exceed 20*l.*, what costs is the solicitor entitled to recover from his client?

**A.**—By 19 & 20 Vict. c. 108, s. 36, the solicitor can in such case only recover ordinary costs from his client, unless the latter, in writing under his hand, has agreed to pay further costs and charges, in which case the registrar may allow any costs or charges not exceeding the amount agreed to be paid. By the new scale the costs are as follows:

In actions where amount recovered exceeds 40*s.* but not 5*l.* the charges are as follows:

	<i>s.</i>	<i>d.</i>
Instructions for summons and attending entering plaint ...	8	0
Attending court ... ..	10	0
Above 5 <i>l.</i> and not exceeding 10 <i>l.</i> :		
Letters before action ... ..	8	4
Instructions for ordinary summons and attending issuing plaint	6	8
Attending in court ... ..	15	0
Over 10 <i>l.</i> and not exceeding 20 <i>l.</i> :		

Same as above, except that 5*s.* is allowed for taxing costs.

This scale of charges came into operation on Nov. 2, 1875: (see Pollock's County Court Practice, p. 221, 8th edit.)

(a) By consent of both parties County Courts have jurisdiction to any amount, and in any action, except on a judgment in the High Court. Also, where an amount above 50*l.* is reduced by an admitted set-off.

(b) In actions founded on contract, where the plaintiff recovers not exceeding 50*l.*, he is only entitled to such costs as he would have been entitled to in the County Court unless otherwise ordered: (Ord. LXV., r. 12.)



**Q.**—Will any privilege protect a person from being sued in the County Court, and would the same privilege allow the party to sue in the High Court for a debt that might be recovered in this court?

**A.**—Under the 9 & 10 Vict. c. 95, s. 67, a question arose as to whether an attorney, as plaintiff or defendant, still retained his privilege of suing and being sued in the court of which he was an attorney, for causes of action which would otherwise come within the jurisdiction of these courts. But it has since been enacted by the 12 & 13 Vict. c. 101, s. 18, that, "no privilege shall be allowed to any attorney, solicitor, or other person," to exempt him from the provisions of the statute 9 & 10 Vict. c. 95.

**Q.**—Can a party prosecute a plaint in a County Court, on a judgment recovered in the High Court, for a debt less than 50*l*?

**A.**—Not since the 19 & 20 Vict. c. 108, s. 27.

**Q.**—A. having obtained a County Court judgment against B. for an amount exceeding 20*l*., finds that B. has no goods within the jurisdiction of such County Court, but has goods beyond such jurisdiction. How can he satisfy his judgment out of the last-mentioned goods?

**A.**—The high bailiff of the court may send the warrant of execution to the registrar of the County Court within whose jurisdiction the goods are, with a warrant thereto annexed under the hand of the high bailiff and seal of the court from which the original warrant issued requiring execution of the same; and the registrar of the court to which the same is sent affixes the seal of the court, and hands it to the high bailiff, who executes it and makes his return to the high bailiff of the court from which the warrant originally issued: (Arch. C. C. 156, 5th edit. ; see also 29 Vict. c. 14, s. 11.)

**Q.**—In what case does the new County Courts Act prohibit an action being brought for the price of ale, beer, &c.

**A.**—No action can be brought in any court to recover any debt alleged to be due for the sale of any ale, porter, beer, cider, or perry, which, after the 31st December, 1867, was consumed on the premises where sold or supplied; nor for money or goods lent or supplied, or security given, for obtaining any such ale, porter, beer, cider, or perry: (30 & 31 Vict. c. 142, s. 4.)

**Q.**—Suppose a judge of a County Court should have exceeded his jurisdiction by trying a cause which he ought not to have tried, what steps can be taken against him?

**A.**—In such a case a writ of *prohibition* may be obtained from any of the divisions of the High Court. The application may be made to a judge at chambers for a rule or order for the writ, either in term or vacation (13 & 14 Vict. c. 61, s. 22); and the matter is to be finally disposed of by such rule or order, and no declaration or further proceedings in prohibition are allowed: (see 19 & 20 Vict. c. 108, s. 42.)

**Q.**—In what cases and within what time may a defendant apply to have an action transferred to the County Court?

**A.**—In actions of contract where the claim does not exceed 50*l*. the defendant may apply within eight days from the service of the writ. In

proceedings in equity, which might have been commenced in the County Court, the judge to whose Court the proceeding is attached may make the order on the application of either party, or, if he sees fit, without such application: and in actions of tort, on the affidavit of the defendant that the plaintiff has no visible means of paying the costs, the court will make the order at any time, unless the plaintiff gives security or show a cause of action fit to be prosecuted in the Superior Court: (30 & 31 Vict. c. 142, ss. 7, 8, 10; Jud. Act. 1873, s. 67.)

*Q.*—How may an action commenced in the County Court be removed to the High Court?

*A.*—If the amount claimed is above 5*l.*, the plaint, by leave of a judge of the High Court, may be removed thereto by writ of *certiorari* on such terms as he thinks fit: (9 & 10 Vict. c. 95.) So if the sum claimed be under 5*l.* the plaint may also be removed by *certiorari* if the judge thinks fit, and the party applying gives security, approved by the master, not exceeding 100*l.* The writ should be served on the judge or registrar at once: (Pollock's C. C. 190-194, 7th edit.)

*Q.*—Is there any appeal from the decision of the County Courts, and in what cases?

*A.*—Yes; either party in any cause to an amount exceeding 20*l.*, if dissatisfied with the determination or direction of the court in point of law, or upon the admission or rejection of any evidence, may appeal to a Divisional Court of the High Court. (*a*) Also, upon the same grounds, where the court has tried an action of ejectment or title to hereditaments (see *ante*, p. 168), and the judge may now give leave to appeal in any action, if he thinks fit: (13 & 14 Vict. c. 61, s. 14; 17 & 18 Vict. c. 16; 30 & 31 Vict. c. 142, s. 13.)

*Q.*—Before what court must an appeal from a County Court judge be heard? In what cases is leave to appeal necessary before going to the Court of Appeal?

*A.*—By sect. 45 of the Judicature Act, 1873, the appeal from a County Court judge is heard by the Divisional Court of the High Court of Justice consisting of such of the judges thereof as may be assigned for that purpose. The determination of such appeal by such Divisional Court is final in all cases unless special leave to appeal to the Court of Appeal be given by the said Divisional Court.

*Q.*—What is a court baron, and what a court leet?

*A.*—A court baron is a court incident to every manor in the kingdom, holden by the steward within the manor. It is of two natures: the one is a customary court, appertaining entirely to the copyholders, in which their estates are transferred, &c.; the other is, or rather was (see 30 & 31 Vict. c. 142, s. 28), (*b*) a court of common law having jurisdiction in any personal action of debt, case, or the like, where the debt or damages did

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(*a*) But by the 19 & 20 Vict. c. 108, the parties may, before the decision is pronounced, agree in writing, signed by them or their solicitors or agents, that the decision of the judge shall be final; and this agreement does not require any stamp.

(*b*) No action is now to be brought in any inferior court, not being a court of record: (30 & 31 Vict. c. 142, s. 28.)

not amount to 40s., as well as to determine controversies relating to the right of lands within the manor : (3 St. C. 281, 8th edit.) A court leet is a court of record held once or twice in every year within a particular hundred, lordship, or manor, before the steward of the *leet*, for the preservation of peace, and the chastisement of divers minute offences : (4 Bl. C. 273.)

Q.—Describe the different modes by which cases are removed from the inferior courts.

A.—Causes from inferior courts of record are removed by *certiorari*, or *habeas corpus cum causâ* (Ohit. Arch. 1320, 12th edit.); and from inferior courts, *not* of record, causes were generally removed by writs of *pone recordari facias loquelam*, or *accedas ad curiam*, according to circumstances : (see Holth. L. D. 2nd edit.); as to the removal of replevin from the County Court, see *ante*, p. 164, and of causes from County Courts, see *sup.*)

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## HIGHWAYS.

Question.—What is a highway, and in whom is the soil presumably vested ?

Answer.—A highway is a passage which is open to all the King's subjects, and the general *primâ facie* presumption of law is that the freehold of the road, *usque ad medium filum viæ*, is in the proprietors of the land on either side : (see notes to *Dovaston v. Payne*, 2 Sm. L. C. 147, 150, 8th edit.)

Q.—How are highways to be stopped up, diverted, or turned ? (a)

A.—By the Highway Act (5 & 6 Will. 4, c. 50, amended by 4 & 5 Vict. cc. 51, 59 ; 8 & 9 Vict. c. 71, and 25 & 26 Vict. c. 61) the inhabitants in vestry assembled may direct the surveyor to apply to two justices of the division to examine a highway, with a view of its being diverted or stopped up ; and if a certificate of the justices in favour of the proceeding is sent to the quarter sessions, the justices there assembled are to make the order accordingly. But in case of a diversion, the proceedings must be by consent of the owner of the lands through which the new highway is to pass. And a party, thinking himself aggrieved, may appeal from the certificate of the justices to the quarter sessions, before the order of that court is made : (3 St. C. 138, &c., 8th edit.)

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## SOLICITOR AND CLIENT.

Question.—When may attachment be issued against a solicitor for misconduct in an action ?

Answer.—1. For not giving his client notice of an order for interrogatories, or discovery, or inspection : (Ord. XXXI., r. 23.)

2. For bringing an action without authority : (*Ex parte Stuckey*, 2 Cox, 283.)

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(a) This question has also been asked several times in the Criminal Law division.

3. For not entering appearance in pursuance of undertaking : (Ord. XII., r. 18.)
4. For disobedience to order for delivery of bill : (*Dent v. Barnham*, 23 L. J. 161, Ex.), or for delivery of deeds.
5. For contempt : (*Ex parte Townley*, 3 D. 39.)
6. Where he omits to pay costs as ordered by the court : (Debtors Act, 1869.)

**Q.**—When a solicitor has carried on a cause up to a certain point, can he stay it unless his client furnishes him with money ?

**A.**—Yes ; for although a solicitor's undertaking to carry on a suit is an entire contract to carry it on to its termination, and can be determined by the solicitor only upon reasonable notice, yet a solicitor who has undertaken a cause is not bound to proceed in it without adequate advances from time to time, by the client, for expenses out of pocket : (Chit. Arch. 93, 13th edit.)

**Q.**—Assuming a solicitor, by negligence or unskilfulness, so to mismanage his client's cause that it is lost ; has such client any remedy by action against such solicitor ?

**A.**—If the client has sustained damage from the gross negligence, or gross ignorance of his solicitor, he may maintain an action against his solicitor for damages.

**Q.**—Can a party change his solicitor during an action, and, if so, are there any conditions imposed upon such party ?

**A.**—Any person can now change his solicitor without a judge's order for that purpose upon notice of it being filed in the Central Office or district registry, but until this is done, and if in the Chancery Division left at chambers, the former solicitor will be considered the solicitor of the party : (Ord. VII., r. 3.)

**Q.**—In what manner can a solicitor who enters into a special agreement for remuneration with his client enforce the agreement ?

**A.**—By motion or petition to the court where the business was done, for the amount agreed to be paid, where such agreement is made in respect of any business transacted in any court of law or equity ; otherwise before any judge of the High Court. Where below 50*l.* before the County Court judge who would have had jurisdiction in an action upon the agreement : (33 & 34 Vict. c. 28.)

**Q.**—What is the extent of a solicitor's lien on property of his client in his hands, and on a fund paid into court in an action brought for his client by a solicitor ?

**A.**—A solicitor, or his representative after his death, has a lien for his general balance upon deeds or papers of his client (commensurate with the right of the client) which have come to his hands in the way of his professional employment. So, by the order of the court or judge, the solicitor has a lien or charge upon property recovered or on a fund paid into court in an action ; or upon money and costs ordered to be paid to the client, for his taxed costs of suit : (Chit. Arch. 137, 13th edit. ; 23 & 24 Vict. c. 127, s. 28.)

**Q.**—Has a solicitor any lien upon a judgment, and, if so, of what nature?

**A.**—A solicitor has an active lien upon a judgment obtained by him for his client, and upon any money levied under an execution upon it, for his costs in the suit in which the money is recovered; and no set off can be allowed to prejudice this lien: (*Simpson v. Lamb*, 28 L. T. Rep. 245; see also 23 & 24 Vict. c. 127, ss. 27, 28.)

**Q.**—Is there any, and what, difference between the lien of a country solicitor and that of his town agent, as to costs due from a client?

**A.**—Yes; the country solicitor has a lien upon all papers, &c., of his client in his hands, to the extent of the general balance due to him from the client for costs. An agent to a country solicitor has no lien for his *general* balance upon any money of the client which comes into his hands; but he has a particular lien to the extent of his agency charges in that particular suit: (Chit. Arch. 137, *et seq.*, 13th edit.)

**Q.**—Is the right of lien of a solicitor affected by his taking security for his costs, or by the Statute of Limitations?

**A.**—The right of lien is lost by taking security: (see Chitty on Contracts, 11th edit., p. 398.) But it is not affected by the Statute of Limitations: (*Ib.* 740.)

**Q.**—A solicitor at Christmas delivers bills to four clients: one for borrowing 1000*l.* on mortgage; another for defending an action for libel; a third for issuing a writ in equity, to compel the completion of a purchase; and a fourth for defending a client charged with an assault at the sessions. Are any, and which, of these bills liable to be taxed? and if the bills are delivered on the 1st of January and not paid, when can the solicitor commence an action to recover them? and if the solicitor had died, and the bills were delivered by his executor, would they be liable to be taxed?

**A.**—The bills delivered to all the four clients are liable to be taxed. And it makes no difference if the bills were delivered by the solicitor's executor, the solicitor being dead. The solicitor cannot commence an action to recover the amount of his bill until one (calendar) month has elapsed from the delivery of a signed bill; therefore an action cannot be brought until the 1st of February: (6 & 7 Vict. c. 73; 33 & 34 Vict. c. 28; Gray's Costs, 525, *et seq.*; and see *Codwell v. Neale*, 28 L. T. Rep. 173.)

**Q.**—What is necessary to be done by a solicitor before commencing an action to recover his costs?

**A.**—He must, one calendar month before he commences his action, deliver or send to the party charged a bill of his fees, charges, and disbursements subscribed by such solicitor, or inclosed in or accompanied by a letter signed by the solicitor and referring to the bill: (6 & 7 Vict. c. 73, ss. 37, 38.)

But a solicitor may set off the amount of his bill of costs in an action brought against him by his client, although he has not delivered a signed bill a month before the action: (*Brown v. Tibbetts*, 6 L. T. Rep. N. S. 385.)

And a judge may order an action to be brought before the expiration

of a month if the defendant is about to quit England, or to become bankrupt.

*Q.*—What is the rule of evidence as to the admissibility of communications between a solicitor and client, and on what grounds does it rest?

*A.*—The rule is that such communications are privileged from disclosure. The privilege is not that of the solicitor, but of the client, who may waive it. The rule is founded on grounds of public policy : (*Minet v. Morgan*, L. Rep. 8 Ch. App. 361.)

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## CONVEYANCING, AND LAW OF REAL AND PERSONAL PROPERTY.

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### DIVISIONS OF PROPERTY, &c.

**Question.**—What are the two great divisions of property according to English law? Point out their distinguishing characteristics (a) in possession, (b) in alienation *inter vivos*, (c) in devolution on death.

**Answer.**—Property is divided into two kinds—realty and personalty.

- (a) Real property consists of things substantial and immovable, and of the rights and profits annexed to or issuing out of them; it lasts for ever, and is divided into corporeal and incorporeal hereditaments. Personal property consists of money, goods, and other movables, and such rights in real property as are limited in their duration. It is divided into chattels real and chattels personal.
- (b) Real property must be conveyed by deed, whereas personalty passes either by deed or delivery where this is possible.
- (c) Realty on death of the owner descends to the devisee or heir-at-law, whereas personalty goes to the executor, or to the administrator in trust for the next of kin: (see Will. R. P. 7 *et seq.*, 13th edit.; Will. P. P. 1, 2, 10th edit.)

**Q.**—What is a chattel real?

**A.**—Any estate in lands and tenements which does not amount to a freehold is a chattel real. It is called a chattel *real* because it concerns or savours of the realty, also to distinguish it from things which have no concern with realty: (1 St. C. 279, 8th edit.; Will. R. P. 8, 9, 13th edit.; and see 2 Bl. Com. 316.)(a)

**Q.**—What is a chattel personal?

**A.**—Chattels personal consist of mere movables, and the rights connected with them: (1 St. C. 279, 8th edit.; Will. R. P. 8, 9, 13th edit.)(b)

**Q.**—What do you understand by the word “hereditament,” and what will pass by it in a deed?

**A.**—It is the most comprehensive that is used in deeds; for it includes not only lands and tenements, but also whatever may be inherited, be it corporeal or incorporeal, real, personal, or mixed. By the grant, therefore, of all hereditaments may pass honours, isles, castles, seigniories, manors, messuages, lands, woods, moors, heaths, reversions, commons, rents,

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(a) Estates for years, at will, at sufferance, the next presentation to a church, and the like, are chattels real: (1 St. C. 278 *et seq.*, 8th edit.)

(b) Money, goods, patent and copyright, &c., are chattels personal.

annuities, vicarages, advowsons in gross, tithes, offices and the like, which the grantor hath in fee simple, at the time of the grant: (Holth. L. D., 2nd edit.; Co. Litt. 6.)

**Q.**—What do corporeal hereditaments consist of?

**A.**—They consist of such as affect the senses, such as may be seen and handled by the body, and are, in fact, the same as *land*: (1 St. C. 169, 8th edit.; Will. R. P. 10, 13th edit.)

**Q.**—What is necessary to make a gift of furniture valid?

**A.**—Either the possession of the furniture must be given to the donee, or the gift must be evidenced by deed: (2 Sm. Com. 678, 4th edit.)

**Q.**—If certain lands be conveyed to a purchaser, and no notice be taken in the conveyance of any buildings upon, or mines or minerals under, the land, would such mines and minerals pass to the purchaser? State any legal maxim applicable to that question.

**A.**—They will pass to the purchaser; for the ownership of land carries with it everything above and below the surface, the maxim being *Cujus est solum, ejus est usque ad cælum (et ad inferos)*: (Will. R. P. 14, 13th edit.; 1 St. C. 167, 8th edit.)(a)

**Q.**—Suppose A. grants a piece or pool of water to B., what is the extent of B.'s estate therein? What words should be used to assure the freehold of it to a purchaser?

**A.**—On the grant of a certain piece of water the right of fishing passes, but not the soil. To assure the freehold of it to the purchaser it should be conveyed as so many acres of land covered with water: (1 St. C. 167, 8th edit.) But it seems the word "pool" includes not only the water but the land on which it stands: (Co. Litt. 5, b.)

**Q.**—If real estate be purchased out of partnership funds, is it treated as real or personal estate in any and what respects?

**A.**—If bought and held for the purpose of the partnership, it will be considered in equity, as personal estate, subject to all the equitable rights and liabilities of the partners and their creditors; and will pass to the personal representatives on the death of a partner, except, perhaps, where there is a clear expression of the deceased partner that it should go to his heir-at-law beneficially: (see St. Eq. § 674.)

**Q.**—A., B., and C. are the joint registered owners of a ship and 1000*l.* Consols. Upon the death of B. and C., in whom do the shares in the ship vest, and in whom the Consols? What is the maxim?

**A.**—The shares of B. and C. in the ship will vest in their respective personal representatives, the law, in order to the encouragement of commerce, vesting in the executors or administrators of a deceased partner the share of the deceased in all personal chattels in possession, such as merchandise, or ships which were the joint property of the partnership. The maxim is *Jus accrescendi inter mercatores locum non habet*. With respect

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(a) In applications to obtain registration of a title as indefeasible, mines and minerals were not included in a description of the land unless expressly mentioned (25 & 26 Vict. c. 53, s. 9), nor will they pass in conveyances under the Lands Clauses Act, unless expressly included, and in copyholds they belong to the lord.

to the Consols *prima facie*, the maxim would not apply, and A., as survivor, would be entitled to the 1000*l.*: (Wms. P. P. 357, 12th edit.)

Q.—If A. lend to B. and Co. a sum of money upon a contract in writing that A. will receive a rate of interest varying with the profits of the trade carried on by B. and Co., or a stated share in such profits, will such loan constitute A. a partner with B. and Co.?

A.—No; the 28 & 29 Vict. c. 86, providing against this: (see this statute set out *ante*, p. 25.)

Q.—When is real estate considered as personal and personal as real?

A.—Real estate, articked, conveyed, or devised to be sold and turned into money, is reputed as money; and money articked or bequeathed to be invested in real estate is considered as real estate, and descendible and devisable as such; for equity looks upon that as done which ought to be done: (St. Eq. § 790.)

Q.—Should the direction to sell an estate be absolute or discretionary in order to constitute an equitable conversion of freehold into personalty?

A.—The direction to sell must be absolute in order to constitute an equitable conversion of freehold into personalty: (6 Jur. 658, 775; *Greenway v. Greenway*, 1 L. T. Rep. N. S. 463.)

Q.—Define the term “heirlooms.” Give an instance.

A.—Heirlooms are such personal chattels as go, by force of a special custom, to the heir and not to the executor or administrator of the last owner, who, if he leaves the land to descend to his heir, cannot by his will bequeath the heirloom. The ancient jewels of the Crown are heirlooms: (Wms. P. P. 13, 10th edit.)

Q.—State the principal distinctions in the mode of the devolution of real and personal estate on the death of the owner intestate.

A.—Real estate, on the death of the owner intestate, devolves on his heir-at-law, but personal estate is distributed among the next of kin, according to the Statute of Distributions.

A.—Explain the meaning of the following phrases: (1.) No feoffment can have a tortious operation. (2.) *Id certum est, quod certum reddi potest.* (3.) *Verba fortius accipiuntur contra proferentem.* (4.) *Jus accrescendi præfertur oneribus.* (5.) *Jus accrescendi præfertur ultimæ voluntati.*

A.—(1.) This means that a feoffment cannot create an estate by the wrong, as it could previously to the Act 8 & 9 Vict. c. 106. (2.) “That is sufficiently certain which can be made certain;” as, for instance, if a lease be granted for twenty-one years after three lives in being, though it is uncertain when that term will commence because these lives are in being, yet when they die it is reduced to certainty: (Broom’s Legal Maxims, p. 623 *et seq.*, 5th edit.) (3.) “The words of an instrument shall be taken most strongly against the party employing them:” (*Ibid.* p. 594.) (4.) “The right of survivorship is preferred to the burdens,” or charges on the property. (5.) “The right of survivorship is preferred to the last will,” which means that the survivor of two joint tenants will take the whole, in preference to any portion of it going to the devisee of a deceased joint tenant.

**Q.**—Give the meaning of any three which you may select of the following terms and phrases, with some explanation of them: (a) A use upon a use; (b) A fee simple conditional; (c) Freebench; (d) A watercourse; (e) Protector of the settlement.

**A.**—(c) “Freebench” is that interest which a widow is entitled to in her husband’s copyhold or gavelkind lands after his decease: (Will. R. P. 386, 13th edit.)

(d) “A watercourse” is an easement which gives the owner of it a right to the natural flow of the water; a right to the natural purity of the water; and a right to take the water for natural use: (Brown’s Law Dict. p. 127.)

(e) “The protector of the settlement” is the person whose consent a tenant in tail must obtain before he can bar an estate tail and the remainders over, and without whose consent he can only create a base fee: (Will. R. P. 53, 13th edit.)

## TENURES AND NATURE OF ESTATES.

**Question.**—What is the theory as to the chief or ultimate ownership which lies at the root of the whole English system of land tenure?

**Answer.**—The grand and fundamental maxim of all feudal tenure is this—that all lands were originally granted out by the Sovereign, and were therefore holden either mediately or immediately of the Crown: (see 2 Black. Com., 9th edit., p. 53.)

**Q.**—“Seised in his demesne as of fee.” Analyse the foregoing phrase, and explain, very shortly, the meaning of its terms.

**A.**—This technical expression describes a tenant in fee simple in possession of a corporeal hereditament. The expression means that the land to which it refers is a *dominium* or property, since it belongs to him and his heirs for ever. Yet this *dominium* property or demesne is strictly not absolute or allodial, but qualified or feudal, or is his demesne, *as of fee*,—that is, it is not purely and simply his own, since it is held of a superior lord in whom the ultimate property resides: (2 Bl. 105.)

**Q.**—Enumerate the different tenures which have existed and which still exist in real property. What is the principal statute affecting them?

**A.**—The ancient tenures were—Knight service. Grand serjeanty. Cornage. Free socage, which also comprised Petit serjeanty, tenure in burgage, and gavelkind. Villein socage or copyhold. Antient demesne and frankalmoign.

The three first were converted into free socage by the statute 12 Car. 2, c. 24; the others remain, and the derivative tenure of leasehold may be had in all of them.

**Q.**—State the ordinary tenure of land.

**A.**—The ordinary lay (a) tenures are (and have been since the statute 12 Car. 2, c. 24) freehold and copyhold (in which latter are included land

(a) The word “lay” is here used, for there is still the ecclesiastical tenure of frankalmoign to be occasionally met with.

held in ancient demesne and customary freeholds), with the derivative tenure of leaseholds: (see St. C. tit. "Tenures." (a))

Q.—What is borough English tenure?

A.—It is socage tenure; but, according to custom, the estate descends to the *youngest* son in exclusion of all the other children. The custom does not in general extend to collateral relations: (see 1 St. C. 61, 8th edit.; Will. R. P. 131, 13th edit.)

Q.—What is the legal presumption as to the tenure of lands of inheritance in the county of Kent?

A.—They (whether in fee or in tail) are presumed to be of the tenure of gavelkind (or, as it has been more correctly styled, socage tenure, subject to the custom of gavelkind) unless the contrary be shown: (Lit. Ten. s. 265; Rob. Gav. by Norwood, 27, 28; Will. R. P. 130, 13th edit.)

Q.—What are the principal distinguishing features of such tenures? (b)

A.—(1) The tenant is able to alien his estate by feoffment at the early age of fifteen; (2) the estate did not escheat on conviction of murder; (3) the lands descend equally to all the sons or other male collateral relations, on failure of nearer heirs; (4) the widow is dowable of a moiety of the lands, but only while she remains unmarried and chaste; (5) the husband is entitled to curtesy whether he has issue born or not, but only of a moiety, and this ceases on his marrying again: (1 St. C. 212, 8th edit.)

Q.—What is a tenancy in ancient demesne?

A.—This tenure exists in those manors which belonged to the Crown in the reigns of Edward the Confessor and William the Conqueror, and in Domesday Book are denominated "Terræ Regis Edwardi" or "Terræ Regis." The tenants are freeholders, and possess certain ancient immunities, the chief of which is the right to sue and be sued only in their lord's court: (Will. R. P. 131, 13th edit.)

Q.—What is the difference in the tenure of the following estates: A lease to A. for ninety-nine years.—A lease to A. for ninety-nine years, if B. shall so long live.—A. lease to A. for three lives.—A lease to A. for ninety-nine years, if he shall so long live?

A.—A lease to A. for ninety-nine years, also a lease to A. for ninety-nine years if B. (or A.) shall so long live, are leaseholds merely; whilst a lease to A. for three lives is a freehold interest: (Will. R. P. 395, 13th edit.)

Q.—Is the estate of longer duration necessarily the greater estate in law? Give an explanation in support of your answer.

A.—No; as an estate for 999 years is only a chattel interest, and,

(a) "All real property," says A'Beckett, in his "Comic Blackstone," "is held, and generally pretty tightly held, by those who possess it. This tenacity of property is such that the thing holden is called a *tenement*, the holder a *tenant*, and the mode of holding a *tenure*:" (p. 100.) This is clear and pithy, if not very humorous.

(b) Also asked thus: To whom will land, held according to the tenure or custom of gavelkind, descend? and in what part of England does this custom more especially prevail?



therefore, a lesser estate in the eye of the law than an estate for life, which is a freehold interest.

**Q.**—Can a lessee for 999 years grant a lease for life? and give the reason for your answer.

**A.**—He cannot; for the estate for 999 years is the less estate in the eye of the law: (see Will. R. P. 414, 13th edit.; 1 St. C. 280, 8th edit.)

**Q.**—What are legal and what are equitable estates?

**A.**—Legal estates are those limitations of interest in realty which gave a party a right at law to the ownership and profits; an equitable estate is such an interest as was not, for most purposes, noticed at law, but in equity was in fact the beneficial ownership of the land and its profits as distinguished from the mere legal seisin: (1 St. C. 229, 8th edit.; Will. R. P. 163, 13th edit.)

**Q.**—What is the largest and what is the smallest estate of freehold of which a man can be seised?

**A.**—An estate in fee simple is the largest, and an estate *pur autre vie* the smallest estate of freehold of which a man can be seised.

**Q.**—What is an estate of freehold?

**A.**—It is an estate either of inheritance or for life in lands of free tenure: (see 1 St. C. 229, 8th edit.; Co. Litt. 43 b.; Will. R. P. 22, 13th edit.)

**Q.**—Mention the different senses in which the terms “estate” and “freehold” are used in connection with real property, and the meaning of each.

**A.**—An estate in lands and tenements may be considered—1. In reference to the nature of the ownership; *i.e.*, whether it be legal or equitable. 2. In reference to the quantity of interest; *i.e.*, whether freehold or less than freehold. 3. With regard to the time of enjoyment; *i.e.*, whether the interest is in possession or expectancy. 4. With regard to the number and connection of the tenants. The term *freehold* denotes the *tenure* of the property, and shows that the owner thereof has a life estate at least: (see 1 St. C. 229, 230, 8th edit.)

**Q.**—Describe an estate of inheritance, and state the different kinds?

**A.**—An estate of inheritance is where the tenant is not only entitled to enjoy the land for his own life, but where, after his death, it is cast by the law upon the persons who successively represent him *in perpetuum* in right of blood, according to an established order of descent. Estates of inheritance are either estates in fee simple or fee tail: (1 St. C. 230, 8th edit.)

**Q.**—What is the difference between an estate in fee simple and an estate in tail general?

**A.**—The difference between them is one of *quality*, not *quantity*: (see *post*, tit. “Estate in fee simple.”) An estate in fee simple is the largest estate or interest the law of England allows a man to possess in landed property, and on the death of the owner intestate descends to his heirs, either lineal or collateral; whilst a fee tail will only descend to the lineal heirs. Again, there is a difference in the mode of their conveyance: (see *hereon post*; St. C. vol. 1.)

**Q.**—Define the several kinds of estates with regard to their quantity of interest, stating which arise by operation of law.

**A.**—They are the following: 1. Estates in fee simple. 2. Estates tail. 3. Estates for life, and *pur autre vie*, tenancies in tail after possibility of issue extinct, and estates by curtesy and dower; and these three latter arise by operation of law. 4. Estates for years, estates at will and at sufferance: (see 1 St. C. chaps. 3, 4, 5.)

**Q.**—What are the words of limitation proper to use in a deed in creating each respective class of estate?

**A.**—The proper mode of creating an estate in fee simple is by limiting the estate “to (the grantee) *his heirs and assigns for ever*.”

An estate tail is created by limiting it to the grantee, and the “*heirs of his body*.” This limitation would create an estate tail general. An estate tail special is where the limitation is to particular heirs. (But by 44 & 45 Vict. c. 41, s. 51, after Dec. 31, 1881, it will be sufficient in a deed to use the words “in fee simple,” or “in tail” respectively.)

An estate for life is created either by an express limitation to the grantee “for and during his life,” or the life of another, or simply to him without any further words of limitation, which in a deed gives him a life estate.

An estate for years is created by a grant or demise to the grantee, his executors, administrators, and assigns (these words of limitation, however, are not essential), to hold for the term of ——— years.

An estate at will is where lands, &c., are let by one to another to hold at the will of both parties. It may be constituted by agreement either written or verbal.

An estate at sufferance is where one comes into possession of land by a lawful title, and, after his estate is ended, wrongfully continues in possession: (see 1 St. C. chaps. 3, 4, 5.)

**Q.**—How may an estate tail, an estate for life, and an estate for years be destroyed?

**A.**—An estate tail may be destroyed by barring the entail and turning it into a fee simple, and formerly by forfeiture. But the 33 & 34 Vict. c. 23, s. 1, provides that after the passing of that Act (4th July, 1870), no confession, verdict, inquest, conviction, or judgment of or for any treason or felony, or *felo de se* shall cause any attainder or corruption of blood or any forfeiture or escheat. An estate for life or years may be destroyed by surrender or merger: (see Will. R. P. 49, 57, 281, 414, 13th edit.)

**Q.**—What are the several kinds of estates with regard to the time of their enjoyment?

**A.**—They are either in possession or expectancy; and the latter are at common law either remainders or reversions: (see 1 St. C. ch. 7.)

**Q.**—What is a disclaimer and its consequences?

**A.**—A *disclaimer of tenure* is where a tenant who holds of any lord neglects to render him the due services, and upon action brought to recover them, disclaims to hold of his lord; such disclaimer in any court of record is a forfeiture of the lands to the lord. As to disclaimer of *estate*, no person can be compelled to take an estate by *conveyance* against his will. Therefore, on his refusal to take the estate, the effect of the conveyance

to him may be avoided by executing a deed of disclaimer: (1 St. C. 474, 476, 8th edit.)

*Q.*—Give an instance of an estate upon condition.

*A.*—If A. grants to his lessee for years that upon payment of a hundred marks within the term he shall have the fee, this is a condition precedent, and the fee does not pass until the hundred marks are paid. But if A. grants the fee, reserving to himself and his heirs a rent, and that if not paid it should be lawful for him and his heirs to re-enter and avoid the estate, then the grantee has an estate upon condition subsequent: (1 St. C. 294, 8th edit.)

*Q.*—Where a condition is annexed to a grant of an estate in fee simple, what is the result of the breach of the condition—1st, When it is precedent; 2nd, when it is subsequent? (*a*)

*A.*—Where the condition is precedent, it must be performed before the estate can vest, even if the condition cannot be performed or is unlawful. Where, however, the condition is a valid condition subsequent, then, on breach, the estate becomes void. But at common law the grantor or his heirs must have avoided the estate by entry; otherwise it would still continue in the grantee. When the performance of a mere condition subsequent becomes impossible or void, the estate remains in the grantee: (see St. C. 296, 299, 8th edit.)

*Q.*—Devise of real estate to A., a widower, for life, and of other real estate to B., a widow, for life, with a condition in each case, that a gift should be forfeited if the devisee should marry again. What is the effect of a condition in each case? Would the effect be different in either case if the gift were of the income of personalty?

*A.*—The condition is valid in each case whether the gift is of realty or (there being a gift over) of the income of personal estate; the doctrine that conditions in restraint of marriage are void does not apply at all to real estate, nor as regards widows even to personal estate: (Jarman on Wills, ch. 27.) And it has been recently held that widows and widowers are on the same footing in this respect: (*Allen v. Jackson*, L. Rep. 1 Ch. Div. 397.)

## ESTATES IN FEE SIMPLE.

*Question.*—What is an estate in fee simple?

*Answer.*—It is the largest estate or interest which the law of England allows any person to possess in landed property, and is that which a man hath to him and his heirs: (Will. R. P. 61, 13th edit.; 1 St. C. 232, 8th edit.)

*Q.*—Who is a tenant in fee simple?

*A.*—One who holds land or tenements to him and his heirs, so that the estate is descendible not merely to the *heirs of his body*, but to *collateral* relations, according to the rules and canons of descent: (Will. *ubi sup.*; 1 St. C. *ubi sup.*)

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(*a*) A similar question has been asked in the Common Law Division.

**Q.**—What words will create or pass a fee simple estate in a will or in a deed respectively ?

**A.**—In a will the fee will pass without any words of limitation, unless a contrary intention appears : (1 Vict. c. 26, s. 28.) But in a deed the word *heirs* is absolutely necessary to be used as a word of limitation to mark out the estate, and no other word or periphrasis can supply its place ; (a) as if a man purchase lands to hold *to him for ever* or *to him and his assigns for ever*, he will only take an estate for life : (Will. R. P. 213, 13th edit. ; 1 St. C. 236, 8th edit.) ; but after Dec. 31, 1881, see 44 & 45 Vict. c. 41, s. 51, *ante*, p. 184.

**Q.**—Into what sorts are estates in fee simple divided ?

**A.**—Into three sorts : 1st. Absolute (that is, free from all condition or qualification.) 2nd. Qualified or base. 3rd. Conditional ; a division, however, which relates to the *quality* and not to the *quantity* of the estate : (1 St. C. 237, 8th edit.)

**Q.**—What is the difference in duration between an absolute estate in fee simple and a base fee ?

**A.**—An absolute estate in fee simple is unlimited in duration, and fails only for want of heirs. Whereas a base fee (defined *post*) is determined as soon as the condition or qualification to which it is subject is at an end.

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### ESTATE TAIL.

**Question.**—What is an estate tail ?

**Answer.**—An estate given to a man and the *heirs of his body* (or after the 31st December, 1881, if given *in tail*, see *ante*, p. 184). This is such an estate as will, if left to itself, descend on the decease of the first owner to all his lawful issue, children, grandchildren, and more remote descendants so long as his posterity endures ; and, on the other hand, if the first owner should die without issue, his estates, if left alone, will then determine : (Will. R. P. 36, 13th edit. ; 1 St. C. 241, 8th edit.)

**Q.**—By force of what statute is a fee tail ?

**A.**—The statute *De Donis* (13 Edw. 1, c. 1), called also the Statute of Westminster the second : (see Will. R. P. 44 and note, 13th edit. ; 1 St. C. 241, 8th edit.)

**Q.**—Give the dates and history of the statutes *De Donis Conditionalibus* and *Quia Emptores*.

**A.**—The statute *De Donis Conditionalibus* (13 Edw. 1, c. 1) was passed to keep up the feudal system, the existence of an expectant heir having grown into a reason for alienation, and the barons of the time of Edward I. felt that the possibility of lands which they had granted by conditional gift to their tenants and the heirs of their bodies reverting to them again was very small : (Will. R. P. 44, 13th edit.) The statute *Quia Emptores* is the 18 Edw. 1, c. 1. It was passed to prevent the practice of subinfeudation, and to enable every freeman from thenceforth

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(a) Except the equivalent word "successors" in case of a grant to a corporation.

to dispose of his lands held in fee simple. Since this statute it has been impossible to create a tenure of an estate held in fee simple: (Will. R. P. 68, 13th edit.)

*Q.*—What was the effect of the decision of the judges in *Taltarum's case*?

*A.*—Formerly, where a person had lands granted to him and the heirs of his body he could, the moment he had issue born, alienate the lands; to prevent this the statute *De Donis* was passed which enacted that the will of the donor, according to the form in the deed of gift manifestly expressed should be from thenceforth observed, so that they to whom the land was given should have no power to alienate it, whereby it should fail to remain unto their own issue after them, or to revert unto the donor or his heirs, if issue should fail. The power of alienation was restored by the effect of the dicta of the judges in *Taltarum's case*, in which it was first suggested that the destruction of an entail might be accomplished by judicial proceedings conclusively taken against a tenant in tail for the recovery of lands entailed: (see Will. R. P. 41, 43, 9th edit. and Year Book 12 Edw. IV., 19; L. C. Con. 695.)

*Q.*—How many kinds of estates tail are there?

*A.*—There are two kinds, viz., tenancy in *tail general*, and tenancy in *tail special*. And each of these may be confined to *tail male*, or *tail female*: (Will. R. P. 36, 13th edit.; 1 St. C. 243, 8th edit.)

*Q.*—What constitutes an estate in tail general, and what special?

*A.*—It is general where it is given to one and the heirs of his body generally, and without restriction except to males or females. Special, when it is restrained to heirs of the body, on a particular wife, as stated *infra*: (and see 44 & 45 Vict. c. 41, s. 51.)

*Q.*—By what words in a deed may an estate in tail male, in tail general, and in tail special, be aptly created?

*A.*—An estate in tail male is created in a deed by a limitation to one and the heirs male of his body; in tail general, to a man and the heirs of his body; in tail special, to a man and the heirs of his body, on Mary his now wife to be begotten: (Will. R. P. 36, 13th edit.; 1 St. C. 243, 8th edit.; or after 31st December, 1881, if given in tail, see *ante*, p. 184.)

*Q.*—Does the law of perpetuities prohibit the breaking up of an estate in fee simple into several estates in fee tail to take effect one after another; and, if not, why not?

*A.*—It does not, provided the entails be not given to the children of an unborn child; for when the first, or any subsequent tenant in tail entitled to the land becomes of age, he may (with the consent of the protector, if there is one) bar the entail, and thus acquire dominion over the property; (Will. R. P. 52, 13th edit.)

*Q.*—What is an estate tail in remainder, and what an estate tail in possession? And what is the meaning of the term "possession"?

*A.*—Strictly speaking, an estate tail in remainder is one that is preceded by an estate for life. But it must be remembered that if preceded by an estate for years determinable on lives, created by the same settlement as the entail, it is considered in remainder so far as *barring the*

*entail* is concerned. If not preceded by an estate for life or otherwise, it is in possession: (see Will. R. P. 53, 54, 13th edit.; 1 St. C. 566, 571, 8th edit.)

The term "possession" here means the *seisin* or present enjoyment of or right to the present enjoyment of the *freehold* in the lands: (1 St. C. 310, 8th edit.)

Q.—By a will, lands are limited "to A. in tail general." The same limitation by deed. What estate does A. take under the will and the deed respectively?

A.—Under the will, A. takes an estate in tail general, for in a will the intention is looked at, and words of limitation and procreation are not necessary to create an entail: (see 2 Jarm. Wills, 232, &c.) In a deed, however, A. will take but an estate for life for want of words of limitation and procreation (Will. R. P. 145, 13th edit.) unless the deed is dated after 31st of December, 1881: (see *ante*, p. 184.)

Q.—Land limited by deed to A. and the heirs of his body lawfully issuing, what is A.'s estate? And would it have made any and what difference if the limitations had been to A. for life, with remainder to his first and other sons and the heirs of their respective bodies?

A.—A. has an estate tail in the first case; in the second case only an estate for life, with remainder to his first and other sons successively in tail.

Q.—Explain the term "tenant in tail after possibility of issue extinct," and the nature of the estate.

A.—This estate arises on a gift or grant to one in special tail, and the person from whose body the issue was to spring dies without issue, or the issue becomes extinct. The surviving tenant is then termed "tenant in tail after possibility of issue extinct." (a)

This estate is of an uncertain nature, partaking partly of an estate tail and partly of an estate for life. Thus the tenant may commit ordinary but not equitable waste; he cannot bar the entail; and may exchange with the tenant for life: (1 St. C. 260, 583, 8th edit.)

Q.—To what extent may a tenant in tail after possibility of issue extinct commit waste?

A.—He might formerly commit any waste he pleased at law, but equity prevented him from committing malicious or extravagant waste, such as cutting down ornamental timber and pulling down houses, and this he could still be prevented from doing: (*Garth v. Sir J. H. Cotton*, 1 L. C. Eq. 682, *in notis*, 3rd edit.) (b)

Q.—If lands are conveyed to A. and the heir of his body, what estate or interest does A. take? Does he take an estate for life, an estate tail, or an estate in fee simple?

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(a) This question is answered by the above: At what time is a possibility of issue extinct?

(b) By the 1873 Act, s. 25, sub-s. 3, an estate for life, without impeachment of waste, will not confer upon the tenant for life a right to commit equitable waste unless intention to confer such right expressly appears by the instrument creating such estate.



A.—If conveyed by deed, A. will only take an estate for life; for in a deed the word *heirs* is absolutely necessary to give a fee: (Co. Litt. 20 a; 1 Hughes' Pract. Sales, 337, 2nd edit; *Taltarum's case*, L. C. Conv. 610, *in notis*.) But a devise to A. and the heir of his body in the singular number will give him an estate tail, for in a will the intention of the testator is looked at: (1 Hughes' Pract. Sales, 336, 2nd edit., and notes to *Taltarum's case*, L. C. Conv. 612.)

Q.—If lands be given to a man and the heirs male of his body, and he has issue only a daughter, who has issue a son and dies, and then the donee dies, what is the effect as to the estate given?

A.—In such a case the land reverts to the donor and his heirs; for as the first tenant in tail had no issue capable of inheriting under the entail, his estate ceased, and the son of the daughter cannot inherit, he not claiming wholly through an heir male: (see Will. R. P. 38, 13th edit.; 1 St. C. 244, 8th edit.; 1 Sm. Comp. 157, 4th edit.)

Q.—Explain the nature and objects of fines and recoveries, and what was substituted in their place by the Act of Parliament abolishing the same.

A.—In their nature fines and recoveries were fictitious actions at law, and their effect was to bar estates tail and dower, and to pass the interest of married women in real property. A fine was so called, because it was compromised and so put an end to all suits and controversies. A recovery, however, went on to judgment and execution: (Holth. L. D., 2nd edit.) The 3 & 4 Will. 4, c. 74, substitutes a deed enrolled in the Court of Chancery as well for a fine as a recovery, for the purpose of barring entails.

Q.—Who was made demandant, tenant and vouchee respectively, in a common recovery, and why were recoveries suffered sometimes with double and treble vouchees?

A.—In a common recovery the person who issued the writ against the tenant to the præcipe was demandant. The tenant was some indifferent person to whom the lands were conveyed by the recovery deed and against whom the action was to be brought. The first vouchee was the tenant in tail, who was required by the tenant to the præcipe to warrant his title, the crier of the court being the common or ultimate vouchee. A recovery against the tenant in tail only barred his then estate, but if also against another person it barred every interest which he might have in the premises. The recovery might be with double, treble, or further vouchee, so that every estate of inheritance of such first, second, &c., vouchee or their ancestors and all remainders and reversions depending thereon, might be barred: (Will. R. P. 48, 13th edit.; 1 St. C. 568 *et seq.*, 8th edit.)

Q.—State the date and title of the Act of Parliament under which an estate tail can now be barred, and its principal enactments.

A.—The Act referred to is the 3 & 4 Will. 4, c. 74, passed in the year 1833, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance." The principal enactments are to abolish fines and recoveries, and substitute more simple modes of barring estates tail and dower, and to enable married women to



convey their interest in real estates. There are many other provisions too numerous to be here detailed.

**Q.**—Previous to the 3 & 4 Will. 4, c. 74, how was an entail generally barred, if the remainder over, in default of issue, was to the tenant in tail himself; and how if there were remainders over to other persons?

**A.**—In the first case, the issue could be barred by a fine levied by the tenant in tail with proclamations. In the second, a common recovery would have been suffered to bar the remainders over to other persons.

**Q.**—How may an entail be barred at this day—1. By tenants in tail in possession? 2. By tenants in tail in remainder? (*a*)

**A.**—1. A tenant in tail in possession bars the entail and converts his estate into a fee simple by deed, enrolled in Chancery within six months after its execution. 2. So the tenant in tail in remainder bars the entail by the same means; but he must obtain the consent of the protector to effect a complete bar to those in remainder. This consent may be given either by the same deed as that which bars the entail, or by another deed executed and enrolled at the same time as, or before, the former deed: (3 & 4 Will. 4, c. 74; 1 St. C. 576, 8th edit.)

**Q.**—Are there any, and if so, what, tenants in tail who are unable, in any case, to bar their estates?

**A.**—First estates tail, granted by the Crown as a reward for public services, cannot be barred so long as the reversion continues in the Crown. This restriction was imposed by an Act of Parliament of the reign of Henry VIII., and it has been continued by the Act by which fines and recoveries were abolished, and by the Act to facilitate leases and sales of settled estates, so far as regards any sale or lease beyond the term of twenty-one years. There are also some cases in which entails have been created by particular Acts of Parliament, and cannot be barred, and a tenant in tail, after possibility of issue extinct, cannot bar the entail: (Will. R. P. 55, 13th edit.)

**Q.**—Land is devised to a son A. for life, and after his death to a daughter B. for her life, and, after the decease of both, to the heirs of the body of A. A. has an only son, who is, of course, heir apparent, and also daughters; he wishes the estate to go to his daughters, and not to his son. Can he by any and what means effect this without the consent of his son?

**A.**—As A. takes an estate tail under the rule in *Shelley's case*, he may bar the entail in the usual way, and then he will be able to settle the land upon, or devise it to his daughters (subject to B.'s life estate), without the consent of his son (see Burt. Comp. pl. 839, 342, 658; Will. R. P. 49, 54, 258, 13th edit.)

**Q.**—Estates are settled upon A. for life remainder to B. for life, remainder to the heirs of the body of B., remainder over. Can B. by any and what means bar the entail during the life of A.?

**A.**—As B. is tenant in tail in remainder under the rule in *Shelley's case*, he may, with the consent of A., who is the protector, bar the entail by

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(*a*) Also asked thus: By what means may a tenant in tail convert his estate tail into an estate in fee simple?

deed enrolled, &c. Without A.'s consent he can only create a base fee : (Will. R. P. 49, 54, 258, 13th edit.)

Q.—A. and B. are man and wife, but have no child ; land is limited to A. and the heirs of his body by B. During the life of B., or after her death, can A. by any and what means acquire an estate in fee simple in the land ? (a)

A.—During the life of B. A. may, by deed enrolled, &c., bar the entail and acquire the fee simple in the land, but not after the death of B., as he is then only tenant in tail, after possibility of issue extinct : (see 3 & 4 Will. 4, c. 74, s. 18 ; Will. R. P. 55, 13th edit.)

Q.—Where money is settled upon trust to be invested in real estate and to which A. (a married woman) is entitled for life, and B. (tenant in tail) is entitled in remainder, in which way should a transfer of their interests be effected ?

A.—The money would be treated as if the lands were purchased and settled : (see 3 & 4 Will. 4, c. 74, s. 71.) Therefore A. would be looked upon as the protector, and B. as tenant in tail in remainder ; and the mode of transfer would be for A. and B. by deed (duly enrolled), to assign their respective interest in the money to the purchaser, with a declaration in the *habendum* freeing the money from the directions and entail : (see a form, 2 Prid. Conv. 558, 9th edit.) And unless A.'s interest is separate estate, her husband must join in the deed ; (3 & 4 Will. 4, c. 74, ss. 24, 40, 45 ; *Kerr v. Brown*, 33 L. T. Rep. 179.)

Q.—Money is directed to be laid out in the purchase of lands to be settled, and of which A. would be tenant in tail. A. prefers having the money instead of its being laid out. Can he by any and what means avoid such investment, and obtain the money to be paid to him at his own disposal ?

A.—Yes ; he may obtain it by executing a deed of assignment by way of disentailing assurance in the mode above pointed out.

Q.—How can a tenant in tail on attaining twenty-one bring under his own control money in court arising from the sale or part of the settled estate during his minority ?

A.—Till recently it was the practice of the Court of Chancery to pay out money representing land in settlement to the persons who were capable of disentailing it without requiring the execution of a disentailing deed. The Lords Justices did this in *Re Watson* (10 Jur. N. S. 10, 11) But in *Re Butler's Will*, Lord Selborne required a disentailing deed, and a similar course was adopted by the Master of the Rolls in *Re Broadwood's Settled Estates* (1 Ch. Div. 438), and by the Lords Justices in *Re Reynolds* (3 Ch. Div. 61). Here a deceased tenant in tail had created a base fee, and it was held that the fund could not be paid out to the persons claiming through him except upon production of a deed enlarging the base fee.

Q.—Is any reference to the statute necessary in a disentailing

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(a) Also asked thus: An estate is given to A. and his heirs on the body of B. his wife. B. dies without heirs. What is the estate of A., and can he acquire the fee simple, and if so, how ?

assurance? and what is the effect of omitting the enrolment of the deed within the specified time?

A.—No reference to the Act is necessary (a) in a disentailing assurance; what the Act requires is, that it must be evidenced by deed: (s. 40; and for a form, see 2 Prid. Conv. 555, 9th edit.) The effect of omitting the enrolment of a deed within the specified time will be that the assurance will not have any operation under the Act: (see Sug. R. P. Stats. 213.)

Q.—Explain how it was that before the Act for the Abolition of Fines and Recoveries the owner of a previous estate of freehold had much the same power over a tenant in tail in remainder as the protector of the settlement now has.

A.—Without the consent of the owner of the previous estate of freehold, a tenant to the præcipe could not be created, and consequently no recovery could be suffered. A fine only could be levied, which, like a deed enrolled since the statute, without consent of the protector, simply barred the issue and not remainders over.

Q.—Who is “protector of the settlement?” Can a tenant in tail in remainder bar his estate tail without the protector’s consent? and if so, what are the nature and liabilities of the estate which he can create?

A.—A protector of the settlement is, in ordinary cases, the first tenant for life under the settlement, but not exceeding three may be appointed by the settlor without their taking any estate or interest whatever. A tenant in tail in remainder may, without the protector’s consent, by an assurance under this Act, bar his own estate tail, and thus create a base fee, which lasts so long as he has any issue; and when his issue fails, the remainderman or reversioner becomes entitled: (see Will. R. P. 53, 54, 13th edit.; 1 St. O. 578, 579, 8th edit.) (b)

Q.—What special words of the Fines and Recoveries Act affect this point?

A.—The special words of sect. 22 of the Act are these: “The *owner* (c) of the prior estate (for years determinable on lives or any greater estate), or the first of such prior estates if more than one then subsisting under the same settlement, shall be protector of the settlement.”

Q.—Land stands limited to the use of A. and his assigns for his life with remainder to the use of his first and other sons successively, in tail male, with remainder to the use of B. and his assigns for life, with remainder to his first and other sons in tail male. A. has no son. Can the eldest son of B. by any and by what means enlarge his estate into an estate in fee simple in remainder, and who are necessary concurring parties, and why?

(a) But in practice the object of the deed is of course stated.

(b) It must be borne in mind, however, that by the 8 & 4 Will. 4, c. 27, s. 28, a disposition without the consent of the protector will be good against the remainderman or reversioner, if possession be held under it for twenty years after there ceased to be a protector: (see Brow. Stats. 40, 94.) And by 37 & 38 Vict. c. 57, s. 6, since 1873 this is shortened to twelve years.

(c) The owner is the person beneficially entitled to the rents and profits: (*Re Dudson's Contract*, 8 Ch. Div. 628.)

A.—A. being protector of the settlement, the eldest son of B. may, with A.'s consent, by deed enrolled, enlarge his estate into a fee simple : (Will. R. P. 53, 54, 13th edit.)

Q.—A person, previously to the 31st December, 1833, devised lands to the use of A., B., and C., their heirs and assigns, in trust for C. for his life ; with remainder to his children as tenants in common in tail, remainder over ; remainder to A., B., and C., as tenants in common. Who is the protector of the settlement ?

A.—A., B., and C. are the protectors of the settlement. But had the settlement been made after the above date it would be otherwise : (3 & 4 Will. 4, c. 74, ss. 27, 31 ; Brow. R. P. Stats. 87, 90, note.)

Q.—A. is tenant for life, B. is tenant in tail in remainder under the settlement ; A. sells his life interest to C. Who are the necessary parties to the instrument by which B. may acquire an estate in fee simple in remainder ?

A.—The consent of A. is still necessary ; for he does not lose the character of protector by the transfer of the estate by which it was acquired, the office being a personal one : (3 & 4 Will. 4, c. 74, s. 22 ; 1 St. C. 579, 8th edit.)

Q.—Land is by deed limited to the use of A. for life, with remainder to B. in fee. B. dies, having by another instrument, namely, his will, devised the land (subject to A.'s life estate) to C., in tail, with remainder over. A. is still living. C. is desirous of barring his estate tail. State whether there is any protector of the settlement whose consent is necessary in order to enable C. to bar the estate tail.

A.—There is no protector in this case ; the provision as to protectorship in the Act 3 & 4 Will. 4, c. 74, is expressly confined to the case where the prior estate is created by the *same settlement* as the entail : (s. 22 ; Sug. R. P. Stats. 201 ; 1 St. C. 578, 8th edit.)

Q.—What formalities are necessary for rendering valid the consent of the protector of a settlement to the disentailing of an estate tail in freehold and copyhold lands respectively ?

A.—In freehold lands the consent of the protector is required to be given either by the same deed by which the entail is barred, or by a separate deed, to be executed on or before the day of the execution of the former, and to be also enrolled in the Chancery Division of the High Court at or previously to the time of the enrolment of the deed which bars the entail. In copyhold lands the consent is given either by deed to be entered on the court rolls of the manor, or by the concurrence of the protector in the surrender, in which case the memorandum or entry of the surrender must expressly state that such consent has been given : (3 & 4 Will. 4, c. 74 ; W. R. P. 54, 364, 13th edit.)

Q.—A. by deed grants an estate, partly freehold and partly copyhold, to C. and D., to the use of E. for life, with remainder to the use of the heirs of his body ; what estate does E. take in the property so limited ?

A.—E. has a legal *quasi* estate tail in the freeholds, the grant to C. and D. not being to their *heirs*, only a life estate passes. Under the rule in *Shelley's case* E. takes an estate tail, which is only *quasi*, being in a life

estate; he takes the legal estate under the Statute of Uses. No estate in the copyholds passes, as only the lord can *grant* copyholds, the tenant can only convey by surrender.

**Q.**—What is the nature of that estate termed “a base fee”? How was a base fee acquired previous to the 28th of August, 1833? How since that time can a base fee be acquired by a tenant in tail in remainder?

**A.**—The early definition of a base fee and its nature is thus described in Stephen’s Commentaries: “A base fee is one that has a qualification subjoined to it, and which must be determined whenever the qualification is at an end, as in the case of a grant to A. and his heirs, tenants of the manor of Dale; in this instance, whenever the heirs of A. cease to be tenants of that manor, the grant is entirely defeated.”

But a base fee has now, however, and for a considerable time past has had, a more restricted application, viz., that species of qualified fee which, before August, 1833, was created by a tenant in tail levying a fine; and since then by his barring the entail without the consent of the protector as stated *supra*: (see 1 St. C. 238, 242, 579, 8th edit.; Will. R. P. 49, 54, 13th edit.)

**Q.**—How is a base fee converted into a fee simple?

**A.**—It is converted into a fee simple if the immediate remainder or reversion become united with it in the same person: (3 & 4 Will. 4, c. 74, s. 39.) Or the grantor, by afterwards obtaining the assent of the protector, and making a new disposition thereon, may enlarge it into a fee simple: (*Ib.* ss. 19 and 35.) And by 3 & 4 Will. 4, c. 27, s. 23, all remainders and reversions over were barred at the expiration of twenty years (now twelve years by 37 & 38 Vict. c. 57, s. 6) after the time when the assurance, if then executed, would have barred them.

**Q.**—What estate can a tenant in tail in remainder create by any assurances executed (1) with, or (2) without, the consent of the tenant for life in possession?

**A.**—In the first case, presuming the deed is duly enrolled, an estate in fee simple will be created. In the second, only a base fee: (see Will. R. P. 53, 54, 13th edit.)

**Q.**—If under the Act of 1833, for the abolition of fines and recoveries, a tenant in tail makes a valid conveyance to a purchaser and his heirs, is the purchaser’s estate necessarily a fee simple absolute, or what else may it be under any, and if any what, circumstances?

**A.**—No; it may be a base fee only; as where the protector does not consent to the disposition: (Will. R. P. 54, 13th edit.)

**Q.**—What is the effect of a mortgage by tenant in tail in reversion without the consent of the tenant for life? and what precautions should be taken by the mortgagee so as best to insure his obtaining the fee simple on the death of the tenant for life?

**A.**—Assuming the word “reversion” in the question to mean *remainder*, and that the tenant for life is the protector of the settlement, such a disposition would create a base fee only (see 3 & 4 Will. 4, c. 74, ss. 21, 22, 34); but after the death of the tenant for life the tenant in tail has power to enlarge the base fee into a fee simple absolute (s. 19) by a disposition

under this Act : (s. 41.) The mortgagee should therefore get the tenant in tail when he creates the base fee by way of mortgage to enter into a covenant to enlarge the estate on the death of the tenant for life, to which may be added a policy of assurance upon the life of the tenant in tail, which should be assigned by way of collateral security : (Hughes' Conv. 363.)

*Q.*—In case the person who would otherwise be protector is a lunatic, idiot, or of unsound mind, who is then the protector ?

*A.*—The Lord Chancellor or other the person or persons for the time being entrusted by the King's or Queen's sign manual with the care and commitment of the custody of the persons and estates of lunatics or idiots, &c., will be the protector of the settlement in lieu of the person so being a lunatic, &c. : (3 & 4 Will. 4, c. 74, s. 33 ; 1 St. C. 581, 8th edit.)

*Q.*—Where a married woman is protector of the settlement, how is her consent given in order to bar the entail ?

*A.*—If the estate constituting her protector is not settled to her separate use, she and her husband together will be protector ; but if settled to her separate use, she alone will be protector, and in the latter case she may consent to an alienation without her husband's concurrence as if she were sole : (ss. 24, 45 ; *Kerr v. Brown*, 33 L. T. Rep. 179 ; 1 St. C. 581, 8th edit.)

*Q.*—In what case does a judgment against a tenant in tail bind his issue and the remainderman ?

*A.*—A judgment duly registered against a tenant in tail binds his issue, and the remainderman also, when there is no protector of the settlement ; but to bind lands with judgments entered up after the 29th July, 1864, such lands must be delivered in execution, and the writ registered : (1 & 2 Vict. c. 110, ss. 11, 13 ; 27 & 28 Vict. 112, ss. 1, 2 ; Will. R. P. 59, 13th edit.)

*Q.*—Prior to the 3 & 4 Will. 4, c. 74, if a tenant in tail, with the immediate remainder or reversion in fee to himself, levied a fine, he created what was called a base fee, which immediately merged in the reversion, and became subject to any charges affecting the latter, the title to which he was also in future obliged to show. What difference in this respect has been made by the above statute, both as respects past and future cases ?

*A.*—In cases where, after the passing of this Act, there is no intermediate estate between a base fee and the remainder or reversion in fee, the base fee does not merge in the reversion, but becomes enlarged into a fee simple, and the reversion with all charges thereon is consequently destroyed : (see sect. 39, Brow. R. P. Stats. 96, n.)

*Q.*—Can a tenant in tail make a lease which will bind any and what persons after his decease ? State the authority for your answer.

*A.*—Every tenant in tail in possession may, by the 3 & 4 Will. 4, c. 74, make leases by deed, without the necessity of enrolment, for any term not exceeding twenty-one years, to commence from the date of the lease, or from any time not exceeding twelve calendar months from its date, where



the rent reserved is a rack rent, or not less than five-sixth parts of a rack rent : (see ss. 15, 41 ; Will. R. P. 57, 13th edit.) And now by sect. 58 of 45 & 46 Vict. c. 38, a tenant in tail has the same powers as a tenant for life under that Act, *i.e.*, he may make building leases for ninety-nine years, mining leases for sixty years, other leases twenty-one years, subject as in the Act mentioned *supra*.

**Q.**—If a tenant in tail discharge incumbrances on the inheritance, what is the consequence ?

**A.**—If a tenant in tail, in possession, pays off an incumbrance it will ordinarily be treated as extinguished, unless he has kept it alive or held himself out as a creditor of the estate in lieu of the mortgage ; because a tenant in tail in possession can make himself absolute owner of the estate. The like doctrine does not *prima facie* apply to a tenant in tail in remainder, whose estate may be altogether defeated ; for if he pays off an incumbrance, it must be presumed that he means to keep it alive : (St. Eq. § 486.)

**Q.**—Suppose a tenant in tail conveys the fee simple of an estate by lease and release to a purchaser ; what estate does the purchaser acquire ?

**A.**—If the tenant in tail was in possession, the purchaser, provided the deed be enrolled within the six months, will acquire the fee simple. If the tenant in tail's estate was in remainder, the purchaser, if the protector consent, will also acquire the fee ; for by sect. 40, *et seq.*, any assurance, unless it be a will, by which a person can convey the legal estate in fee simple absolute, provided it be enrolled as prescribed by the Act, will suffice : (see 1 Hughes' Pract. Sales, 150, 177, 2nd edit. ; and see 4 & 5 Vict. c. 21 ; 8 & 9 Vict. c. 106, s. 2.)

**Q.**—If a tenant in fee simple contracted to make a conveyance, and died before it was made, equity would enforce the contract against his heir ; was there a like equity as to the contract of a tenant in tail ? Give a reason for your answer.

**A.**—No ; for the issue claim *per formam doni*, or, more strictly speaking, because the tenant in tail can make no disposition (save a lease to bind his issue or the remainderman) except by deed enrolled : (see Will. R. P. 46, 57, 13th edit.)

**Q.**—Can personal property be entailed ?

**A.**—No ; and this was the same both at law and in equity. A gift of personal property to A. and the heirs of his body will simply vest in him the property given : (*Leventhorpe v. Ashbie*, L. C. Conv. 700 ; and see notes to *Wild's case*, *ib.* 542 ; but see *Audley v. Horn*, 1 L. T. Rep. N. S. 317.)

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## ESTATES FOR LIFE.

**Question.**—What are estates for life ?

**Answer.**—They are freeholds not of inheritance : (Burt. Comp. pl. 723 ; Will. R. P. 16, 13th edit. ; 1 St. C. 252, 8th edit.)



**Q.**—By what terms is an estate *pur autre vie* usually designated in a deed?

**A.**—As an estate for the natural life of the *cestui que vie*.

**Q.**—State the general tenures of estates for life; and what denomination of property they are.

**A.**—Estates for life are of freehold tenure: (Will. R. P. 18, 22, 13th edit.; 1 St. C. 252, 8th edit.) By some they are denominated real property (Matts. Exors. 2, 2nd edit.); but as estates *pur autre vie* do not descend to heirs, who, by the Statute of Frauds, can only take as special occupants, where expressly named in the grant, but otherwise go to the executors or administrators as assets, they partake more of the nature of personal property.

**Q.**—A. enfeoffs to B. and his assigns for ever. Livery of seisin is duly made. What estate does B. take by the feoffment?

**A.**—He takes an estate for life only; the word “heirs” being necessary in a deed to limit or mark out a fee: (Will. R. P. 147, 13th edit.)

**Q.**—What by common speech is he called, who holds for the term of his own life? and what he who holds for the term of another’s life?

**A.**—When he holds for his own life, he is called tenant for life; when he holds for the life of another he is styled tenant *pur autre vie*: (Will. R. P. 20, 22, 13th edit.; 1 St. C. 252, 8th edit.)

**Q.**—What is special occupancy?

**A.**—If A., having an estate for life, should dispose of it to B. and his heirs, B.’s estate will last so long as A. lives; if, therefore, B. should die before A., his heir may enter and hold possession, and in such a case is called in law a *special occupant*: (Will. R. P. 20, 13th edit.)

**Q.**—An estate to A. for the life of B., and another to A. for the term of 500 years, if the survivor of B., C., and D. shall so long live, which is the greater estate in A.?

**A.**—The estate to A. for the life of B. is the greater, this being a freehold, while the estate for 500 years, if the survivor of B., C., and D. shall so long live, is only a chattel interest.

**Q.**—Is a tenant for life without impeachment of waste liable for any and what damage to the estate? May he cut and sell timber, and open mines, and apply the proceeds for his own benefit, or must the proceeds be applied for the benefit of the estate?

**A.**—As above stated, he is in such a case only liable for what is termed equitable waste; i.e., acts formerly punishable in equity but not at law, such as pulling down the family mansion or cutting down ornamental timber. With this exception, he may cut and sell timber and apply the proceeds for his own benefit; he may also work and open mines (see *Bowle’s case*, L. C. Conv. 16, *in notis*; *Garth v. Sir J. H. Cotton*, 1 L. C. Eq. 559, 2nd edit.); but see now 1873 Act, s. 25, sub-s. 3, if an intention appears to that effect.

**Q.**—What interest in the Normanton Park Estate would a man have who had the largest possible freehold estate in it, and what interest one who had the smallest? Taking the smallest possible freehold estate, what powers over the property would the owner of it possess, e.g., as to

management, felling timber, opening or working mines, demising, and the like ?

A.—The largest would be an estate in fee simple ; the smallest an estate *pur autre vie*, that is, an estate for the life of another. A tenant *pur autre vie* (unless unimpeachable of waste, and then he must not commit equitable waste) must manage the estate properly and not commit waste ; that is, he must not fell timber, except for repairs, &c., or open mines, but may work those which have been opened. A tenant for life beneficially entitled to possession under a settlement may sell or exchange the settled land without the consent of the court, or make leases—building ninety-nine years, mining sixty years, other leases twenty-one years—accept surrenders, and make numerous improvements under the conditions mentioned in the Act ; and the court may give him many other powers (and see *post*).

Q.—Can a tenant for life by any, and what means create a permanent charge on the estate for improvements upon it ?

A.—He may by leave of the Court of Chancery make improvements by draining the land with tiles, &c., or by warping, irrigation, or embankment, &c., and charge the costs thereof with interest not exceeding 5 per cent. per annum, payable half-yearly, on the inheritance. The principal money to be repaid by equal annual instalments of not less than twelve nor more than eighteen ; or, in case of building, not less than fifteen nor more than twenty-five. In some cases the money may be charged on the estate as a rent-charge for twenty-five years, and by 33 & 34 Vict. c. 56, with the sanction of the Inclosure Commissioners the tenant for life may charge the settled estate to the extent of two years' rental to erect or complete a mansion house thereon. In all other respects the improvements must be made at the tenant's own cost : (Will. R. P. 30, 13th edit.)

Q.—State shortly the power of sale given to tenants for life by the Settled Land Act, 1882.

A.—By sect. 3 of 45 & 46 Vict. c. 38, he may sell the settled land or any part, or any easement, &c. ; and when the settlement comprises a manor he may sell the seignory of any freehold land, or the freehold and inheritance of any copyhold or customary land, but he may not sell the mansion house and demesnes without the consent of the trustees or order of the court : (sect. 15.) By sects. 35 and 37 he may, under certain conditions, sell timber and heirlooms. One month's notice before sale must be given to each of the trustees by registered letter : (sect. 45.)

Q.—If the dividends on a sum of Consols are given to A. for life, and he dies on Michaelmas-day, are his executors entitled to any portion of the next January dividend, and does it make any difference under what document he takes if it is silent as to apportionment ?

A.—A.'s executors are entitled to the dividends when payable up to Michaelmas-day, by force of the Apportionment Act, 1870 (33 & 34 Vict. c. 35), except when the contrary is expressly stipulated.

Q.—Is a tenant for life bound to pay off incumbrances, or to keep down the interest ; and if a tenant for life discharge incumbrances, what is the consequence ?

**A.**—He is bound to keep down the interest, but not to pay off incumbrances unless under a judgment of the court. If he pays off an incumbrance, he will be deemed a creditor to the amount paid, upon the ground that there can be no presumption that, with his limited interest, he could intend to exonerate the estate. This presumption may, however, be rebutted by circumstances which demonstrate a contrary intention : (St. Eq. ss. 486, 487, 488.)

**Q.**—A. B. is entitled to a life interest in his marriage settlement funds, and desires to borrow money. In what way can he obtain a loan? and state concisely the requisite contents and covenants of the security required.

**A.**—A. B. should insure his life and assign the policy and his life interest in the settlement funds to the mortgagee. The security should contain covenants by A. B. to repay the principal and interest, to pay interest after default, to do nothing to vitiate, but to keep up the policy, with a power for the mortgagee to do this, and to add his payments to principal. The usual provision for redemption, power of sale, and covenants for title should be added. The mortgagee should at once give notice of the assignment of the life interest to the trustees of the settlement, and put a *distringas* upon the stock in the manner provided by Order XLVI. (which abolished the old writ of *distringas*). He should also give notice of the assignment of the policy to the office and obtain their receipt : (30 & 31 Vict. c. 144.) Before proceeding with the transaction at all the mortgagee should ascertain from the trustees of the fund that they have no notice of any prior charge by A. B.

## ESTATES LESS THAN FREEHOLD.

**Question.**—What are estates less than freehold?

**Answer.**—They are the following : Estates for years ; estates at will ; estates at sufferance : (1 St. C. ch. 5.)

**Q.**—What are estates for years, and what denomination of property are they?

**A.**—Estates for years are only chattels real ; and they form part of the personal estate : (Will. R. P. 8, 13th edit. ; 1 St. C. 280, 8th edit.)

**Q.**—What is a tenancy at will?

**A.**—It is one held at the will of both parties, landlord and tenant, so that either of them can determine it at his pleasure : (Co. Litt. 55.) The courts now lean against tenancies at will, and construe demises where no time is mentioned as tenancies from year to year, if rent is paid half-yearly or quarterly : (see *Richardson v. Langridge*, L. C. Conv. 4 ; 1 St. C. 289, 8th edit.)

**Q.**—What is a tenancy at sufferance?

**A.**—A tenancy at sufferance is where a person has originally come into possession of an estate by a lawful title, and holds such possession after his title has determined : (Will. R. P. 391, 13th edit. ; 1 St. C. 291, 8th edit.)

**Q.**—What would be the effect of a devise or gift of leaseholds for years by words which would create an estate tail if the estate were a freehold?

**A.**—The devise or gift will pass the absolute interest in the property to the donee, as leaseholds are not within the statute *De Donis*, and cannot, therefore, be entailed: (see *Leventhorpe v. Ashbie*, L. C. Conv. 700; and notes to *Wild's case*, *ib.*, 542; Will. P. P. 303, 10th edit.; and see hereon *Audley v. Horn*, 1 L. T. Rep. N. S. 317.)

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### ESTATES IN REMAINDER, REVERSION, &c.

**Question.**—Of what sorts are estates in expectancy?

**Answer.**—There are at common law two sorts, viz., estates in remainder and estates in reversion: (1 St. C. 309, 8th edit.)

**Q.**—Explain the phrase “particular estate.”

**A.**—It is a limited legal interest or property in lands or tenements, as distinguished from the absolute property or fee simple therein. Thus, if A. has the absolute property or fee simple in certain lands, and he demises them to B. for a term of years, or for life, the legal interest which B. would thus acquire therein would be called the *particular* estate with reference to A.'s estate in fee simple; i.e., it would be a *particle* or portion carved out of A.'s fee: (Holth L. D. 2nd edit.)

**Q.**—What is an estate in remainder? and what are the different kinds?

**A.**—A remainder is an ulterior estate limited to take effect and be enjoyed after a prior estate is determined, both estates being created at the same time: (see 1 St. C. 315, 8th edit.; Will R. P. 258, 260, 13th edit.) (a) Remainders are of two sorts, vested and contingent: (1 St. C. 315, 8th edit.)

**Q.**—What is an estate in reversion?

**A.**—It is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him: (2 Bl. Com. 175; and see Co. Lit. 22 b.; Will. *sup.*; 1 St. C. 310, 8th edit.)

**Q.**—What is the difference between a reversion and remainder?

**A.**—A reversion arises by act of law, being created by the grant of the particular estate, whilst a remainder arises by act of the party, being created by express grant by the same instrument as the particular estate, and between the particular estate and a reversion tenure exists to which is incident fealty and rent, but there is no tenure between the remainderman and the owner of the particular estate: (Wms. R. P. 244, 13th edit.)

**Q.**—What is a vested remainder?

**A.**—It is a present existing estate, always ready, so long as it lasts, to come into possession the moment the prior estate determines. As, if A.

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(a) Coke describes a remainder as “the remnant of an estate in lands or tenements expectant upon a particular estate, created together with the same at one time:” (Co. Lit. 143 a.)

be tenant for twenty years, remainder to B. in fee; here B. has a vested remainder: (1 St. C. 322, 8th edit.; Will. R. P. 255, 13th edit.)

**Q.**—What are cross-remainders? Can they be implied in a deed or will?

**A.**—Cross-remainders arise on a grant of lands to two or more as tenants in common, with a particular estate limited to each of the grantees in his share, with remainder over to the other or others of them. As, if a man gives land to his two children as tenants in common in tail, and directs that on failure of the issue of one of them his share shall go over to the other in tail, and *vice versa*. In a *deed* they can be given only by express limitation, and can never be *implied*; but in *wills* they may be raised not only by actual limitation, but also by implication: (1 St. C. 351, 8th edit.; 2 Jar. Wills 458, &c.)

**Q.**—Can the owner of an estate in fee simple in land convey the land to A., a bachelor, for life, with remainder to his son for life, and if not why?

**A.**—He may do so; there is no breach of the rule against perpetuities here. Had A. been unborn, the limitation would have been bad, or if there had been a limitation superadded to that of the unborn son: (see Will. R. P. 276, 13th edit.)

**Q.**—What is a contingent remainder? Show the technical creation of one.

**A.**—Contingent remainders are those limited either to an uncertain *person* or upon an uncertain *event*. As, a limitation to A. for life, remainder to the first son of B., who has then no son born; here is a contingent remainder, for it is not certain that B. will ever have a son: (see 1 St. C. 322, 8th edit.; Will. R. P. 265, 13th edit.) (a)

**Q.**—Will a chattel interest support a remainder?

**A.**—It will support a vested remainder, (b) as if a person seised in fee grant lands to A. for twenty years, and after the determination of the said term to B. and his heirs; here A. is tenant for years (a chattel interest), and B. has a vested remainder. But a contingent remainder, if it amounts to a freehold, cannot be limited after an estate for years, or any other particular estate less than a freehold: (1 St. C. 320, 322, 325, 8th edit.)

**Q.**—Can a limitation be good as a contingent remainder which would be void for perpetuity as an executory interest? and if so, give an example.

**A.**—If lands be given to A. for life, and after his decease to such son of A. as shall first attain the age of twenty-four years, as a contingent remainder the estate is well created; and if A. has a son who attains twenty-four before A.'s death it becomes vested. Such a limitation would be void by way of executory interest, as it might infringe the rule against perpetuities: (see Wms. R. P. 273, 13th edit.)

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(a) By 40 & 41 Vict. c. 38, a contingent remainder created after the passing of the Act (2nd Aug. 1877) in the event of the particular estate determining before the contingent remainder vests, is capable of taking effect if it would have been valid as a springing or shifting use or executory devise or other limitation, had it not had a sufficient estate to support it as a contingent remainder.

(b) A lease at will is not such an interest as will support it.

**Q.**—It is said of a freehold that it must always be vested in somebody. Show how this doctrine has affected the law of real property.

**A.**—In consequence of this rule a contingent remainder formerly failed if it did not vest during the continuance of the particular estate, or immediately that it determined. This has now been removed by 8 & 9 Vict. c. 106, s. 8, and 40 & 41 Vict. c. 33.

**Q.**—State the difference between a remainder and a reversion.

**A.**—In addition to what has been already stated, they differ in this respect, that the former always has its origin in express grant, whilst the latter arises incidentally by operation of law in consequence of the grant of the particular estate. But it is said that a remainder chiefly differs from a reversion in this: That between the owner of the particular estate and the owner of the remainder no *tenure* exists, as there does between the particular tenant and the reversioner: (see Will. R. P. 244, &c., 13th edit.)

**Q.**—State the difference between a remainder and an executory devise, and between an executory devise and a conditional limitation.

**A.**—A remainder differs from an executory devise in the following particulars:—1. A remainder may be created either by deed or will, an executory devise (*a*) by will only. 2. A remainder requires a particular estate to support it, and must await the regular determination of such particular estate; whereas an executory devise may be limited to commence *in futuro* without any preceding estate to support it, and if there be a preceding estate, may operate to the absolute determination of such interest. 3. A remainder, as such, cannot be limited after a fee simple, but an executory devise may: (see Fearn. Cont. Rem. 10, 14, 225, 504, &c., and notes by Butler.)

The distinction between an executory devise and a conditional limitation is slight: a conditional limitation, as such, arises under the Statute of Uses, and in a deed is also known as a shifting use, and operates to abridge or determine a preceding estate on breach or non-performance of a condition annexed thereto. Such a limitation in a will would be designated as an executory devise. But it is not necessary that an executory devise should be limited after a prior estate on condition: (Fearn. Cont. Rem. 17, 272, 504.)

**Q.**—Distinguish a condition subsequent from a conditional limitation.

**A.**—“A condition subsequent” on its breach avoids the previous estate, but at common law entry was necessary by the grantor or his heirs to avoid it; but this is not necessary in the case of “a conditional limitation” where the preceding estate determines on the happening of the event.

**Q.**—State the rule in *Shelley's case*.

**A.**—Whenever an estate of *freehold* is given, and by the same conveyance or will an ulterior estate (whether mediately or immediately) is limited to the *heirs* of the same person in fee or in tail, such ulterior estate vests in that person himself in the same manner as if it had been

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(*a*) For a definition of an executory devise, see *post*, tit. “Testamentary Alienation.”



expressly given to him and his heirs. The word "heirs" being a word of limitation and not of purchase: (L. C. Conv. 148; 1 St. C. 330, 8th edit.; Will. B. 255, 13th edit.) (a)

Q.—Where is the rule to be found?

A.—It is originally reported in the 1st Coke's Reports, 104 a; but it will also be found in any of the text-books on the principles of conveyancing: (see them cited *ante*.)

Q.—If real property be limited to A. for life, remainder to B. for life, remainder to the right heirs of the body of A., with remainder to the right heirs of B., what estate do A. and B. take respectively?

A.—A. will take an estate tail, subject to B.'s life estate, and B. will take the remainder in fee, under the rule in *Shelley's case*.

Q.—B. granted the manor of Stoke to A. for life, with remainder to C. and the heirs of his body, with an ultimate remainder to the right heirs of A.; he also demised an adjoining farm to A. for the term of ninety-nine years, limiting the reversion in like manner to C. and the heirs of his body, with an ultimate remainder to the right heirs of A. What estate or interest has A. in each case?

A.—In the first case A. will take an estate in fee simple, subject to the intervening estate tail to C. and the heirs of his body. This is by the rule in *Shelley's case*. In the second case, as no estate of *freehold* is limited to A., the rule does not apply, and A. has an interest for a term of ninety-nine years only.

Q.—Is there any, and what difference between a limitation of an estate to E. F. for life, with remainder to the heirs of his body, and a limitation to G. H. for life, with remainder to his first and other sons successively and the heirs of their respective bodies?

A.—Yes; in the first case E. F. takes an estate tail under the rule in *Shelley's case* (*supra*); but the second limitation being to the heirs of the bodies of his sons respectively, G. H. takes only a life estate, and his sons estates tail successively.

Q.—Explain accurately the effect of the following:—1. Grant to A. for life, remainder to B. for life, remainder to the heirs of A. 2. Grant to A. for life, remainder to the heirs male of B. 3. Grant to A. and B. (husband and wife) and C. jointly, remainder to the heirs of the body of D. remainder to the heirs of A.

A.—1. Here A., by the rule in *Shelley's case*, has an estate in fee simple, subject to the intervening life estate of B.

2. A. takes a life interest. B.'s heirs a remainder in fee contingent on B.'s dying in A.'s lifetime. The reversion in fee being left in the grantor.

3. D.'s heirs of his body have an estate tail contingent on D.'s death in the lifetime of the others, and subject to A., B., and C.'s life estates held now in equal shares, those of B. and C. being held in joint tenancy, and

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(a) This rule is thus humorously stated in Coke's Rep. in verse:

"Shelley, whose ancestors a freehold take,  
The words (his heirs) a limitation make."



that of A. in common, through the accession of interest to A. by the ultimate remainder to his heirs, which also gives A. the fee subject to the preceding estates.

By 40 & 41 Vict. c. 33, if the grants were subsequent to 2nd of August, 1877, the contingent remainders to B.'s heirs male, and to D.'s heirs of body *might* take effect, although B. and D. did not respectively pre-decease the tenants for life.

Q.—A. on his marriage limited a freehold estate to the use of himself for life, with remainder to the use of his first and other sons successively in tail, with remainder to the use of B. in fee. Is either and which of the above remainders vested or contingent?

A.—The limitation of the remainder to the use of B. is a vested remainder. But the limitation of the remainder to the use of the sons of A. is a contingent remainder for the reasons stated *ante*: (Will. R. P. 255, 269, 13th edit.)

Q.—Why were limitations to trustees to preserve contingent remainders formerly necessary, and why are they no longer required?

A.—They were formerly necessary, because, if the particular estate had been prematurely determined by the voluntary act of the tenant for life, the contingent remainder would have been destroyed. They are no longer required, because the 8 & 9 Vict. c. 106, s. 8, enacts that a contingent remainder shall be capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger, of any preceding estate of freehold in the same manner in all respects as if such determination had not happened: (see 1 St. C. 328, 8th edit.; Will. R. P. 281, 285, 13th edit.)

Q.—In limitations in strict settlement, was the estate limited to trustees to preserve contingent remainders vested or contingent? State the reason for your answer.

A.—The estate given was vested. For otherwise, if the particular estate had been prematurely determined by forfeiture, surrender, or merger, the contingent remainders would have been destroyed; because a contingent remainder of freehold requires a freehold to support it: (see Will. R. P. 285, 13th edit.) But now see 40 & 41 Vict. c. 33, note (a), *ante*, p. 201.

Q.—An estate is limited to A. for life, with remainder to the first and other sons of B. in tail, with remainder to C. in fee. A. dies, leaving B. and C. surviving, but B. is still unmarried; to whom does the estate devolve?

A.—The remainder to the sons of B. in tail is a contingent remainder which must vest during the continuance of the particular estate, or the moment it determines, therefore, if A. dies before the birth of a son to B., the estate will go over to C. at once. The 8 & 9 Vict. c. 106, s. 8, as above shown, provides a remedy for the premature determination of the particular estate by forfeiture, surrender, and merger, but not in case of death: (1 St. C. 330, 8th edit.; Will. R. P. 269, 281, 318, 13th edit.)

If the contingent remainder were created after 2nd August, 1877, now, by 40 & 41 Vict. c. 33, it might take effect as a shifting use or execu-

tory devise, in case B. had a son born within twenty-one years of A.'s death.

*Q.*—What was the advantage of taking a conveyance of a reversion by lease and release, instead of by grant?

*A.*—Because it saved the expense, in future investigations of the title, of proving the existence of a particular estate at the time the reversion was conveyed as such (*Watk. Con.* 193, n., *Cov. edit.*), and obviated the consequences of the mistake if it turned out that the estate was not in fact a remainder or reversion: (*2 Sm. C. Comp.* 744, 4th edit.) (*a*)

*Q.*—What are the requisites to produce a merger of an estate?

*A.*—There must be a greater and less estate meeting in the same person in the same right, without any intermediate estate, which will at once cause the less estate to be *merged* in the greater if the latter be the more remote: (*1 St. C.* 313, 8th edit.; *Will. R. P.* 283, 13th edit.) (*b*)

*Q.*—If a tenant in tail becomes also possessed of the immediate remainder or reversion in fee, expectant on the determination of his estate tail, by failure of his own issue, will the estate tail merge in the fee? State the reasons for your answer.

*A.*—The estate tail will not merge in the fee; for it is preserved and protected from merger by the operation and construction, though not by the express words, of the statute *De Donis*, 13 Edw. 1, c. 1: (*Will. R. P.* 283, 13th edit.; *1 St. C.* 313, 8th edit.)

## ESTATES IN SEVERALTY, JOINT TENANCY, TENANCY IN COMMON, AND COPARCENARY, &c.

*Question.*—What is an estate in severalty?

*Answer.*—An estate held by a man in his own right only, without any other person being joined or connected with him in point of interest during his estate therein: (*1 St. C.* 335, 8th edit.; *Will. R. P.* 105, 138, 13th edit.)

*Q.*—Who are joint tenants? and why are joint tenants so called?

*A.*—Where an estate is acquired by two or more persons in the same land by the same title (not being a title by descent), and at the same period, and without any words importing that they are to take in distinct shares, they will take the estate as joint tenants: (*1 St. C.* 336, 8th edit.) Joint tenants are so distinguished, as they have a unity of *possession*, a unity of *interest*, a unity of *title*, and a unity of *time* in the commencement of their title: (*Will. R. P.* 135, 13th edit.)

*Q.*—What is a tenancy in common?

*A.*—A tenancy in common is where two or more hold the same land,

(*a*) Previous to 8 & 9 Vict. c. 106, an estate in possession in corporeal hereditaments could not be conveyed by grant.

(*b*) By the 1873 Act, s. 25, sub-s. 4, there will be now no merger at law where the beneficial interest is not merged in equity.

with interest accruing under different titles; or accruing under the same title (other than descent), but at different periods; or conferred by words of limitation importing that the grantees are to take in distinct shares: (1 St. C. 348, 8th edit.; Will. R. P. 138, 13th edit.)

Q.—By what three means may there be tenants in common?

A.—1. By express limitation. 2. By the destruction of a joint tenancy, as if one of two joint tenants alienates his interest to a stranger. 3. By the destruction of an estate in coparcenary, as if one of two coparceners alienates her share to a stranger: (1 St. C. 349, 8th edit.)

Q.—How is an estate in coparcenary created, and what persons are usually coparceners?

A.—An estate in coparcenary always arises by descent. Females are usually coparceners: (1 St. C. 343, 8th edit.; Will. R. P. 104, 13th edit.)

Q.—Of what two sorts are coparceners? Why are they called coparceners?

A.—Coparcenary arises either by common law or particular custom. By common law, as where a person seised in fee simple or fee tail dies, and his next heirs are two or more females—in this case they shall all inherit. Coparceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degrees, as sons, brothers, uncles, &c.: (1 St. C. 343, 8th edit.)

According to Littleton, parceners are so called because they always could be compelled to make *partition*: (sect. 241; Will. R. P. 104, 13th edit.) But so now can joint tenants and tenants in common: (see St. C. *sup.*; Will. *sup.*)

Q.—A freehold estate devolves upon two sisters in fee as tenants in common; what is the denomination of their tenancy? They have no brother, but have another sister, and one of the two sisters die intestate; who would be entitled to the deceased sister's estate?

A.—As stated in the question, it is a tenancy in common. If the deceased sister left no issue or parent living, her share would descend upon the other two sisters as coparceners, subject to husband's curtesy, if any: (St. C. ch. viii.)

Q.—Do estates held in joint tenancy, tenancy in common, and coparcenary, differ in any and what essential particulars?

A.—Yes, in the following: Among joint tenants there is a unity of title and of time in the commencement of their title. But as to tenants in common, neither of these requisites is necessary, and only the former amongst coparceners. The title of joint tenants and tenants in common arises by purchase, that of coparceners by descent. Among joint tenants there is an entirety and equality of interest; they being seised *per my et per tout*; and there exists the *jus accrescendi*, or benefit of survivorship, between them. Tenants in common and coparceners are each seised of a distinct though undivided share which need not be equal; and there is no benefit of survivorship between either: (1 St. C. ch. viii.)

Q.—If land should be given to A. and B., man and wife, and their heirs, what would their estate be called?

A.—Formerly an estate by entireties (*infra*), but now, by 45 & 46 Vict. c. 75, they would take as joint tenants.

Q.—What is the distinction between a joint tenancy and a tenancy by entireties?

A.—An estate by entireties is that given to husband and wife and their heirs. They are seised *per tout et non per my*; whereas joint tenants are seised *per my et per tout*, and may, without the assent of the other, convey an undivided moiety of the estate. But neither husband nor wife can dispose of any part of the inheritance without the consent of the other: (1 St. C. 338, 8th edit.; Will. R. P. 135, 228, 13th edit.)

Q.—When two persons, not being partners, purchase an estate out of their own money in equal shares, and take a conveyance of the estate, simply to themselves in fee, what is the effect of this conveyance at law and in equity? and what difference would it have made if the purchase money had been contributed in unequal shares?

A.—In the first case put they will hold the estate as joint tenants, both at law and in equity. But in the second, on the death of either of them, there will be no survivorship in equity, they will be deemed to be purchasers in the nature of partners, and to have intended to hold the estate in proportion to the sum which each advanced; but it was otherwise at law: (St. Eq. § 1206.)

Q.—A., B., and C. are brothers, A. being the eldest; B. and C. become joint tenants of land in fee simple; B., without C.'s knowledge, conveys his undivided moiety in fee to D. by way of mortgage—B. then dies; does C. on B.'s death take the entirety, or does a moiety (subject to the mortgage) descend on A. as B.'s heir-at-law?

A.—The mortgage, being an absolute conveyance, will sever the joint tenancy, and C. and D. will hold as tenants in common, and on B.'s death intestate his share will descend to A., his heir, subject, of course, to the mortgage.

Q.—Distinguish an estate held in joint tenancy and coparcenary as to the inheritance.

A.—Where an estate is held by two joint tenants in fee, the inheritance will, on the death of one, descend to the survivor; because joint tenants are seised *per my et per tout*. But coparceners have distinct though undivided shares, and on the death of one intestate, her share will descend upon her heir-at-law: (Will. R. P. ch. vi. pt. 1.)

Q.—A testator devises land to A. and B. and their heirs. A. dies intestate leaving a son, and afterwards B. dies intestate leaving two daughters, one of whom dies intestate, leaving a son. Who can convey the land to a purchaser?

A.—The surviving daughter of B. and the son of the deceased daughter are the proper parties to convey the land. The limitation to A. and B. was one in joint tenancy; and the two daughters of B. were coparceners, amongst whom there is no right of survivorship: (Will. R. P. 104, 477, 13th edit.) (a)

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(a) This question can also be answered from the above: Land is conveyed to A., B., and C., their heirs and assigns. A. dies leaving a son. B. dies next, also leaving a son; and C. dies last, leaving three daughters. How does the land descend on the respective deaths of A., B., and C. intestate?

Q.—What is the proper form of conveyance from one joint tenant to another, and why?

A.—The legal possession or seisin of the whole of the lands belongs to each one of the joint tenants of an estate of freehold; no delivery can therefore be made to him of that which he already has. The proper form of assurance between joint tenants is accordingly a release by deed, and this release operates rather as an extinguishment of right than as a conveyance; for the whole estate is already supposed to be vested in each joint tenant, as well as his own portion. And in the Norman-French, with which our law abounds, two persons holding land in joint tenancy are said to be seised *per mie et per tout*: (Wms. R. P. 137, 13th edit.)

Q.—If there be three joint tenants in fee simple, and one of them releases his share to another of the three, what is the effect of such release, and what are the estates or interests of the various parties after such release?

A.—If one of three joint tenants releases his share to one of his companions, though the jointure is destroyed as to *that* part, yet the two *remaining* parts are still held in jointure, and subject to the right of survivorship; therefore, as to one-third part of the property, the releasee holds it as tenant in common with his companion; but, as to his remaining interest as joint tenant: (see 1 St. C. 343, 8th edit.)

Q.—Three brothers, tenants in common, prior to the Lease and Release Act, 1841, conveyed part of their estate to each brother in severalty by deed of release only. Can such a deed be supported as a good conveyance?

A.—No; as tenants in common (unlike joint tenants who can release) having separate titles must make mutual conveyances as between strangers: (Will. R. P. 139, 13th edit.)

Q.—Can one tenant in common of a single house or a single field separate his interest from that of the other tenant in common, and how in each case?

A.—A tenant in common might formerly have had a decree for partition although there were but one house or one field. But the court would frequently decree a pecuniary compensation to one in order to make up his share to its proper value, where the estate could not conveniently be divided into equal parts: (St. Eq. §§ 654, 657.) And now the 31 & 32 Vict. c. 40, enables the court to order a sale of the property in a case like that given by the question: (see *post*, Div. Eq. tit. "Partition.")

Q.—How may a joint tenancy, or a tenancy in common, be severed?

A.—A joint tenancy may be severed:—1. By partition. 2. By alienation without partition; as if one joint tenant conveys his estate to a third person, and creates a tenancy in common; or releases his share to the other, and turns it into an estate in severalty. (a) 3. By an accession of interest; thus, if there were two joint tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure: (1 St. C. 341, 8th edit.)

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(a) An agreement to sell amounts to a severance, in equity.

A tenancy in common may be dissolved:—1. By partition. 2. By uniting all the titles and interests in one tenant, by purchase or otherwise, which brings the whole to one severalty: (1 St. C. 352, 8th edit.) (a)

Q.—State the various methods of partition between tenants in common and joint tenants, distinguishing between the circumstances to which each method is specially applicable.

A.—Tenants in common and joint tenants may effect a partition.—1. By mutual agreement when all parties are *sui juris*. 2. By application to the Court of Chancery when the parties are not agreed. In each of these cases, mutual conveyances of their respective undivided shares must be made in order to carry the petition into complete effect. With respect to joint tenants these conveyances ought to be in the form of release, but tenants in common make mutual conveyances as between strangers. The partition must be by deed. 3. When the parties are under disability by application to the Inclosure Commissioners for England and Wales, who may make orders under their hands and seals for the partition and exchange of lands which are effectual without any further conveyance or release: (Will. R. P. 138, 13th edit.)

Q.—A. and B. are joint tenants in fee. A. devises his real estate and dies before B. Is the joint estate severed by the devise?

A.—No; a devise by a joint tenant of his share by will is no severance of the jointure: (1 St. C. 342, 8th edit.)

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### INCORPOREAL HEREDITAMENTS, &c.

Question.—What are incorporeal hereditaments? And state the several sorts.

Answer.—An incorporeal hereditament is a right issuing out of a thing corporeal, or concerning or annexed to, or exercisable with the same. They are of three kinds—appendant, appurtenant, and in gross. Advowsons, commons, ways, offices, annuities, and rents are all incorporeal hereditaments: (1 St. C. 646, 8th edit.; Will. R. P. 11, 241, 324, 13th edit.)

Q.—What is “an appendant incorporeal hereditament?” and give an example of one.

A.—It is one which passes by a conveyance of the hereditaments to which it is appendant, as an advowson, when not separated from the manor, is appendant and passes by a grant of the manor: (Will. R. P. 324, 13th edit.)

Q.—How are corporeal and incorporeal hereditaments respectively conveyed?

A.—Since the 8 & 9 Vict. c. 106, s. 3, there is practically no distinction in their mode of conveyance; both being usually conveyed by deed

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(a) As to partition under the Inclosure Acts, see 8 & 9 Vict. c. 118, ss. 147, 150, and Amendment Acts.



of grant. Formerly corporeal hereditaments were said to lie in *livery*, and incorporeal in *grant*: (Will. R. P. 241, 13th edit.; see also 25 & 26 Vict. c. 53.)

Q.—To what class of property does a right of sporting belong? and how can the owner convey it to another?

A.—It is an incorporeal hereditament, and can, therefore, only be conveyed by deed of grant.

Q.—Under what description of property do “offices,” as the office of sheriff, coroner and the like, fall?

A.—“Offices” are a species of incorporeal hereditaments: (2 St. C. 622, 8th edit.)

### 1. *Commons, Rents, &c.*

Q.—State the chief differences between an income derived from rent and from interest on money lent on mortgage.

A.—The leading distinctions are these: 1. Rent is an incorporeal hereditament and real estate; interest, personal estate. 2. Rent (service) accrues as an incident of tenure; interest does not: and the former may be of money or other chattels; interest is of money only. 3. Rent did not formerly accrue *de die in diem*, and therefore at common law there was no apportionment. But now, by the 33 & 34 Vict. c. 35, s. 1, rents are apportionable, like interest on money lent. So rent (with a few exceptions) can only issue out of things corporeal; interest may arise from real or personal estate. 4. Rent is liable to both property tax and land tax; interest to property tax only. 5. Rent can be distrained for at common law; interest cannot: (see *Clun's case*, L. C. Conv. in notis, 233, 3rd edit.)

Q.—State concisely the meaning of the terms intercommon, and common of estovers.

A.—Intercommon is where the commons of two adjacent manors join, and the inhabitants of both have immemorially fed their cattle promiscuously on each other's common. Common of estovers is a liberty of taking necessary wood for the use or furniture of a house or farm from off another person's estate, and may be claimed by grant or prescription: (Holth. L. D. 2nd edit.)

Q.—State the several kinds of rights of common, and explain the differences between them and their respective modes of transfer.

A.—There are five sorts of common: common of pasture, common of piscary, common of turbary, common of estover, and common in the soil.

1. Common of pasture is the principal and most frequent sort, being the right of feeding one's beasts on another's land, and it is either appendant, appurtenant, because of vicinage, or in gross. *Appendant* is the right of the copyholders of a manor to put upon the wastes of the manor their commonable beasts. This is matter of universal right, and arose from necessity. *Appurtenant* ariseth from no connection of tenure or necessity, but arises from grant or prescription, and may be annexed to lands in other lordships, and extend to other than commonable beasts. *Because of vicinage*, where the inhabitants of two townships adjoining



usually intercommon with one another, the beasts of each straying into the other's fields without molestation. The above pass by transfer of the land. *Common in gross*, which is annexed to a man's person, being granted to him and his heirs by deed or by prescriptive right, as to the parson of a church, and requires a deed for its transfer.

2. Common of *piscary* is the liberty of fishing in another man's water, and is transferred by deed.

3. Common of *turbary* is a liberty of digging turf upon another man's ground. It may arise either by grant or prescription, and may be either appurtenant to a house for fuel for it, when it passes by transfer of the house, or in gross, when it passes by deed.

4. Common of *estovers* is a liberty of taking *necessary* wood for the use or furniture of a house or farm from off another's estate. It arises either by grant or prescription, and passes by the transfer of the house or farm.

5. In addition to the above there is also common in the soil, which consists of digging for coals, minerals, stones, and the like: (see 1 St. C. 648 *et seq.*, 8th edit.)

Q.—What is a rent-seck?

A.—A rent-seck (*redditus siccus*), a dry or barren rent, so called because no distress could formerly be made for it. But now the 4 Geo. 2, c. 28, s. 5, gives a remedy by distress for rent-seck in the same manner as rent reserved upon lease. It is a separate incorporeal hereditament: (Will. R. P. 331, 13th edit.; 1 St. C. 674, 8th edit.)

Q.—What is a rent-charge, and how created?

A.—A rent-charge arises on a grant by one person to another of an annual sum of money payable out of certain lands, in which the grantor may have an estate. For this purpose a *deed* or will is absolutely necessary; for a rent-charge, being a separate incorporeal hereditament, cannot be created or transferred in any other way: (a) (Will. R. P. 332, 13th edit.)

Q.—What change has recently been made in the law with reference to a release from a rent-charge or judgment, and how and when was such change made?

A.—Formerly a release of a part of lands charged with a rent-charge was a release of the whole of the lands from such charge, for the law held them entire and indivisible. The same principles appear to apply to a judgment: (Langley's notes to 22 & 23 Vict. c. 35.) But this Act (passed 13th August, 1859,) now provides that such release shall not extinguish the whole rent-charge, but shall only bar the right to recover it out of the hereditaments released. Also that the release from a judgment of part of the hereditaments charged therewith shall not affect the validity of the judgment as to the hereditaments remaining unreleased (see sects. 10, 11); but the right of parties interested not concurring in such release are reserved.

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(a) Unless created by will or settlement it should be registered in the Central Office: (18 Vict. c. 15.)

**Q.**—What is the effect of the purchase of any part of the land charged with a rent-charge by the owner of the rent-charge?

**A.**—Before the 22 & 23 Vict. c. 35, if the owner of the rent-charge purchased part of the lands charged, that operated as a release of the whole of the lands charged (Will. B. P. 339, 13th edit.); and it is presumed that this will still be so, notwithstanding the above Act: (Pask, Judg. 89.)

**Q.**—May a rent-charge be granted in fee or limited by way of use in fee? Is it or not necessary or usual to give a power of distress, and what, if any, other power for securing payment? Give briefly, but substantially, a form of such grant.

**A.**—A rent-charge may be granted in fee at common law, or limited in fee by way of use, but it cannot be *newly* created by bargain and sale. It is usual, but not necessary, to give a power of distress. A power is also added, enabling the grantee to enter after default and receive the rents until the arrears are satisfied: (1 Sm. Comp. 22, 4th edit.; Will. B. P. 337, 13th edit.)

The form would run thus:—Date. Parties. Recitals. Testatum containing consideration and grant of rent-charge charged upon the property described and receipt clause. Habendum. Uses. Covenant to pay rent-charge. Powers of distress and entry. (a) Covenants by grantor for title: (Prid. Conv. 364, 9th edit.)

**Q.**—What statutory remedies are enjoyed by a person entitled to a rent-charge issuing out of land for recovering payment of the same in the absence of express stipulation, under an instrument coming into operation after the 31st December, 1881?

**A.**—(1) By 44 & 45 Vict. c. 41, s. 44, if unpaid for twenty-one days he may enter into and distrain on the land charged.

(2) If unpaid for forty days he may enter into possession and hold the land charged, and take the income until arrears and costs are satisfied; and in such case he may also by deed demise the land charged to trustees for a term of years on trust by any reasonable means to raise and pay the annual sum, arrears, and costs.

**Q.**—How does the rent that is reserved in a lease differ from a rent-charge?

**A.**—The former, called a rent-service, accrues in connection with *tenure*, usually attended by fealty due to the reversioner, and for the recovery of which the common law gives a right of distress, and it may be created in certain cases by words only. The owner of the rent-charge has neither seigniorship nor reversion, and, consequently, claims no fealty, and formerly required an express clause of distress; and this rent must be created by deed unless given by will: (1 St. C. 673-4, 8th edit.)

**Q.**—What length of adverse possession will create a good title to lands? And does it make any, and what, difference if the original owner was a minor when the adverse possession commenced?

**A.**—Formerly twenty years' adverse possession from the time the right

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(a) In instruments coming into operation after 31st Dec. 1881, these will be unnecessary: (44 & 45 Vict. c. 41, s. 44.)

to bring an action to recover the land first accrued created a good title unless the original owner were a minor when the adverse possession commenced, in which case ten years further were allowed from the time of his attaining his majority; but no longer period than forty years was allowed in any case: (3 & 4 Will. 4, c. 27, ss. 16, 17.) By 37 & 38 Vict. c. 57, since 1878 the respective periods are reduced to twelve, six, and thirty years.

**Q.**—What is the extreme period within which a person can bring an action to recover land or rent?

**A.**—The extreme period is now (as above shown) within *thirty years* next after the time at which such right first accrued: (37 & 38 Vict. c. 57.)

**Q.**—For what period can arrears of rent be recovered by distress, and how does the expiration of the tenancy affect the right to distrain?

**A.**—Only six years' (and in tenancies under the Agricultural Holdings Act, 1883, only one year's) arrears can be recovered by distress, and in the event of the bankruptcy of the tenant only one year's accrued due prior to the date of the order of adjudication: (46 & 47 Vict. c. 52, s. 42.) (a) The distress must be made during the continuance of the lease, except when the tenant holds over, in which case the landlord may distrain within six months after the determination of the lease, provided his own title or interest, as well as the tenant's possession, continues at the time of the distress: (9 Anne, c. 14.)

**Q.**—Define an easement.

**A.**—An easement is a right which tends rather to the convenience than the profit of the claimant, as a right of way or water: (1 St. C. 647, 8th edit.)

**Q.**—Define positive and negative easements.

**A.**—When the duty laid upon the owner of the servient land is merely not to do something, as not to shut out his neighbour's light, the easement is said to be negative; if it consists in forbearance, in permitting another to do what, but for the easement, he will not be entitled to do, as to allow another to walk across one's land, the easement is said to be affirmative: (see *Sury v. Pigot*, and notes L. C. C. 166, 8th edit.) As to the negative easement of lateral support and the time for acquiring it, see the important case of *Angus v. Dalton* (4 Q. B. Div. 162, and H. of L. 44 L. T. Rep. 844).

**Q.**—Explain the meaning of the following terms: "Servient tenement," "Dominant tenement."

**A.**—The tenement in favour of which an easement is created is called the "dominant tenement," that over which it is created is called the "servient tenement."

**Q.**—How may easements, such as rights of way, or of drains, or of water, be created *de novo*, and how acquired by prescription?

**A.**—They are acquired *de novo* by deed of grant, or from necessity;

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(a) For the purposes of this section, the term "order of adjudication" shall be deemed to include an order for the administration of the estate of a debtor whose debts do not exceed 50*l.*, or of a deceased person who dies insolvent: (*Ib.* 2.)

and by prescription by an uninterrupted enjoyment for the times mentioned *infra* (and see 44 & 45 Vict. c. 41, s. 62.)

Q.—A. commences to work a brickfield at one extremity of his land, and builds a house at the other extremity. Fifteen years afterwards, one adjoining owner digs brick-earth on his own land so near to that of A., and to such a depth that a portion of A.'s brickfield falls into the hole. Another adjoining owner, with the intention of building on his own land, digs out foundations so near as to injure A.'s house. What are the rights of A. against the adjoining owners?

A.—A. would have a right of action against the adjoining owners for the damage sustained, *if* his own buildings had not contributed to the subsidence; for every landowner, independently of prescription and as an original right incident to property, is entitled to so much lateral support from his neighbour's land as is necessary to keep his soil in its natural state; and he has no *prima facie* right to overburden his own land by buildings and then to require an extraordinary amount of support by his neighbour's land. (a) If, however, his buildings, although of recent erection, do not contribute to the subsidence—that is to say, if the facts show that the subsidence would have occurred even if the building had not been erected—he is entitled to full damages in case of their being destroyed or injured by subsidence caused by subterraneous workings under the adjoining lands: (1 Dart's V. & P. 368, 5th edit.) (b)

Q.—What are the rights to running water (1) above the surface, and (2) under the surface, and to light and air? How may they be prejudiced, and how protected?

A.—The owner of the land through which a watercourse runs must not injure the quality of the water, nor sensibly diminish its quantity, nor as against those above can he dam up the water to their inconvenience; and an action will lie for diverting it; but the right to flowing water, *ex jure naturæ* only prevails where it has a defined course, and does not extend to water flowing over or soaking through permeable land before it has found its way into a definite channel: (*Chasemore v. Richards*, 7 H. of L. Cas. 349; Dart's V. & P. 337, 4th edit.) With regard to light, there must be some building in respect of which it can be claimed, and the right extends not only to light sufficient for the use to which the tenement is for the time being applied, but also to light sufficient for any purposes for which it may reasonably be used: (*Ib.* 332, 333.) Rights to light become absolute after twenty years' uninterrupted enjoyment; they may be prejudiced by interruption, which must be continued for a year. Rights of water are *prima facie* valid after twenty years uninterrupted enjoyment,

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(a) But this right may be obtained by prescription, after twenty years' enjoyment, see *Angus and Co. v. Dalton and the Commissioners of Her Majesty's Works and Public Buildings* (47 L. J. Q. B., 163; on appeal 43 L. T. Rep. 225, and H. L. 44 L. T. Rep. 844.)

(b) The following questions are also answered by the above:

Owners of two adjacent plots of land acquired for building purposes from the same vendor on the same day, build on their respective plots. What are their mutual rights of support?

To what extent is the owner of land entitled to claim lateral support from the neighbouring owner, as to the land itself, and as to houses built thereon respectively?

but may be defeated within forty years on proving grant, licence, or absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised: (*Ib.* 334.)

*Q.*—State the periods of the statutable limitation of time for enforcing claims on land, after the right accrued, in case of rights, to rights of common, right of way, and of water, and right to the use of light respectively.

*A.*—The 2 & 3 Will. 4, c. 71, enacts that, where there has been an uninterrupted enjoyment of a right of common for thirty years next after the right of action accrued, the prescriptive right is not to be taken away except in case of disability; but no action can be brought after sixty years, the right being then indefeasible. The time for enforcing rights of way and water is twenty years, and no action can be brought after forty years: (see 1 St. 689, *et seq.*, 8th edit. and *supra.*)

*Q.*—Can you specify the four Statutes of Limitation as to real property, and trace the growth of the doctrine? When did the last statute come into operation, and what time does it fix as the limit for recovery of land or rent in possession and in reversion?

*A.*—At common law to establish a title by prescription there must have been a usage from time immemorial—(commencement of the reign of Richard I.)

This, by 32 Hen. 8, c. 2, was reduced to sixty years.

2 & 3 Will. 4, c. 71, further reduced the period in the case of easements.

3 & 4 Will. 4, c. 27, in the case of land or rent.

And by 37 & 38 Vict. c. 57, which came into force on January 1st, 1879, proceedings must be taken to recover land or rent within twelve years after the right accrued, and within six years after disability ceasing, not exceeding thirty years from the right accruing. The object of the different Acts has been to shorten the periods within which actions must be brought to recover real property; in case of reversions the time is limited to twelve years after the right to enter accrued, or six years after the reversion vests in possession, whichever is the longer: (see sect. 2.)

*Q.*—What are the conditions of enjoyment necessary to establish a prescriptive claim?

*A.*—The conditions necessary to establish a prescriptive claim at common law are:

1. The title must be always founded on the actual usage of enjoying the thing in question.

2. The enjoyment must have been constant and peaceable (*nec vi, nec clam, nec precario*).

3. There must have been a usage from *time immemorial*, which period in law commences from the time of Rich. 1; proof for twenty years will be a presumption of this. (See now, however, 2 & 3 Will. 4, c. 71, set out below.)

4. Every prescription must be both certain and reasonable.

5. All prescription at common law must be laid either in a man and

*those whose estate he hath* in certain lands, which is called prescribing in a *que estate*, or it must be in a man *and his ancestors*.

6. A prescription in a *que estate* must always be laid in him that is tenant of the fee. A tenant for life, for years, or at will, cannot prescribe by reason of the imbecility of their estate.

7. A prescription cannot be for a thing which could not be raised by grant.

8. What is to arise by matter of record cannot be prescribed for.

9. A person having title to anything by prescription is not to be considered as being himself the purchaser so as to make it descendible to his general heirs according to the ordinary rule of inheritance.

Statute 2 & 3 Will. 4, c. 71, provides, with respect to rights of common and all other benefits to be taken and enjoyed from or upon any land—with the exception of tithes, rents, and services—that after an enjoyment of them by any person without interruption for *thirty* years, the prescriptive claim shall no longer be defeated.

An enjoyment for *sixty* years, with or without the knowledge of the adverse party, renders the claim absolute and indefeasible.

This statute also makes similar provisions with regard to ways and easements—the periods constituting a prescriptive right being, however, *twenty* and *forty* years respectively; and an uninterrupted enjoyment of *lights* for *twenty* years constitutes an absolute and indefeasible right to them, any local usage or custom to the contrary notwithstanding. (See, fully, *Sury v. Pigot*, in *notis*, Tudor's C. O., and 1 Stephen, ch. xxxiii.)

Q.—A. has been in possession for twenty years of copyhold lands to which he has never been admitted, and during that period has done no act to acknowledge the lord's title. What is the effect of such possession on the copyhold title?

A.—In *Walters v. Webb* (L. Rep. 5 Ch. App. 531), it was held that the Statute of Limitations applied to bar the claim of a copyholder who had been out of possession more than twenty years where the lord had seised *quousque*, and it is conceived that the Acts would operate conversely in favour of the *quasi* copyholder in the event of his refusing or neglecting to take admittance and retaining possession for the statutory period without any acknowledgment of the lord's title: (Dart's V. & P. 404, 5th edit.)

Q.—If a testator charge his personal estate with payment of his debts, within what time must creditors enforce their claim? Is there any, and what, difference if the debts be charged on the real estate? and again if there be an express trust to pay debts out of the real estate?

A.—The charge on personalty makes no difference as to the time within which creditors must enforce their claim (six years, simple contract; twenty years, specialty). Where charged on the real estate, by 37 & 38 Vict. c. 57, s. 8, the action must be brought within twelve years after the time specified therein, and by sect. 10 the existence of an express trust will make no difference.

Q.—When lands adjoin a river, to whom does the soil of the river presumptively belong, and does it make any difference whether the river be a tidal one or no?



A.—The soil of one-half of the river to the middle of the stream is presumed to belong to the owner of the adjoining land. But if it be a tidal river the soil up to high-water mark appears presumptively to belong to the Crown : (Will. R. P. 329, 13th edit.)

Q.—Describe the rights of riparian owners, and the restrictions to which they are subject.

A.—Every riparian proprietor has a *prima facie* right to fish the stream in front of his own land, and to use it for his own purposes in any manner not inconsistent with the exercise of a similar right by the proprietors of land above or below ; but he can neither as against those below injure the quality of the water, nor sensibly diminish its quality, nor as against those above can he dam up the water to their inconvenience ; and an action will lie for diverting the water, even without proof of specific injury. The right to divert and use the stream for the purpose of irrigation is a question of degree which cannot be precisely defined ; but depends upon the application of the above general principles to the particular case : (1 Dart. V. & P. 336, 4th edit.)

Q.—In whom is the ownership of the seashore below high-water mark vested as a general rule, and what exceptions may there be to such rule ?

A.—The ownership is presumptively in the Crown ; but grants of parts of the seashore have frequently been made to subjects ; and such grants may be presumed by proof of long-continued and uninterrupted acts of ownership : (Will. R. P. 329, 13th edit. ; *Attorney-General v. Jones*, 6 L. T. Rep. N. S. 655.)

Q.—Give a succinct form in substance of a grant in fee *de novo* of an easement. For instance, a right of passage of water or other easement, with the proper covenants on the part of the grantee in respect of the easement granted.

A.—Date. Parties. Recitals. Testatum containing consideration and grant of the easement in the mode it is to be enjoyed, and the rights incident. Habendum. Covenants by grantor that he has good right to grant, for quiet enjoyment and for further assurance. Covenants by grantee to use the easement according to the grant, and to make good any damage done : (1 Prid. Conv. 405; 9th edit.)

Q.—Can a right of way be conveyed ; and, if so, how ?

A.—It can be conveyed by a deed of grant as pointed out *ante*.

## 2. Tithes and Advowsons.

Q.—Of what do great and small tithes consist ; and what is a *modus*, and what a tithe-rent charge ?

A.—Great tithes consist in general of corn, peas, beans, hay, and wood ; small tithes consist of all other predial, together with personal and mixed tithes. A *modus* is a composition for tithes, which has existed from time immemorial. A tithe rent-charge is a payment in lieu of tithes on the land being discharged from the same under the Tithe Commutation Act : (Holth. L. D., 2nd edit.)

Q.—Is a rent-charge payable to the rector or vicar under the Tithe



Commutation Act fixed, or does it vary; and, if it varies, how is the amount to be ascertained?

A.—The rent-charge is fixed, but the amount payable yearly in respect thereof varies with the price of corn. The amount is ascertained by the Government average of corn, &c., as published in the *London Gazette* for the last seven years: (see 6 & 7 Will. 4, c. 71; Will. R. P. 349, 13th edit.)

Q.—Where under the Tithe Commutation Acts, tithes have been merged by an owner, in fee simple of both the tithes and the land out of which they are issuing, and he afterwards sells the land as tithe or rent-charge free, must he deduce his title to the tithes?

A.—Yes, at present; though the tithes should be extinguished under the above Acts, the early title to them must be produced: (Sug. Conc. V. 267.) For the vendor of the land must show that he had a right to merge the tithes: (Shel. Tithes, 255.)

Q.—What is an advowson, and how may it be acquired, and what right does it confer on its owner?

A.—An advowson is the perpetual right of presentation to a church or ecclesiastical benefice. It may be acquired by a private individual by his building a church and endowing it; by purchase (in its technical sense), and by descent. It may be acquired by the bishop by lapse, by the Crown by lapse, and by forfeiture on simony being committed. The owner or patron has no interest in the tithe or glebe, merely a right of nomination from time to time as the living becomes vacant: (2 St. C. 717 *et seq.*, 8th edit.)

Q.—What are advowsons and rights of next presentations? Under what circumstances may they be legally bought by laymen and clerks respectively?

A.—For an advowson see *supra*. A next presentation is the right to present to a living when it next becomes vacant, and is personal property. Both laymen and clerks may buy either an advowson or next presentation when the living is full. But a clergyman may not buy a next presentation and present it to himself, though he may do the latter if he has bought the advowson.

Q.—How are advowsons severally denominated?

A.—Advowsons are of two kinds—*appendant* and *in gross*. *Appendant*, where it is annexed to a manor so that, if the manor were granted to anyone, the advowson would go with it. *In gross*, where it is severed from the manor to which it was *appendant*. Advowsons are also of rectories or vicarages, and either presentative, donative, or collative: (see Holth. L. D. 2nd edit.; 2 St. C. 718, 8th edit.)

Q.—What is the difference between an advowson presentative and an advowson donative?

A.—An advowson presentative is one where the patron presents, the bishop institutes, and the incumbent inducts himself. A donative is where the patron's deed of donation alone is sufficient to complete the incumbent's title, and is quite independent of the bishop: (Will. R. P. 342, 13th edit.)

**Q.**—What are the obligations and rights of a lay rector with reference to the chancel of the parish church?

**A.**—In the absence of contrary custom, he is under the obligation of repairing the chancel. He has the freehold in it to the same extent only as he has in the church and churchyard. He is entitled to the chief pew therein, but cannot, as a right, make a vault or affix a tablet therein without leave of the ordinary. So the vicar and parishoners have a right to use the chancel for the celebration of the Holy Communion and the solemnisation of marriage: (Cripp's Church Laws, 443, 4th edit.; *Griffin v. Deighton*, 8 L. T. Rep. N. S. 500: 9 *Ib.* 814; *Churton v. Frewin*, 14 *Ib.* 846; 2 St. C. 716, 8th edit.)

**Q.**—An owner in fee of an advowson having presented to the living dies intestate, leaving a son A., and a daughter B., by his first wife, and a son C. by his second wife. A. dies intestate, and afterwards the incumbent dies; who is entitled to the advowson, and why?

**A.**—Presuming A. dies without issue, C., his half-brother, will be entitled to the advowson as heir to his father from whom the descent must be traced, because A. having taken the advowson by descent, is not the purchaser: (3 & 4 Will. 4, c. 106, ss. 1, 2; Brow. R. P. Stats, 166, 167, and notes.)

**Q.**—Who is entitled to the glebe, and great and small tithes, and what duties or obligations attach to the ownership of any of these properties?

**A.**—The parson of the church is entitled to the glebe and tithes. If the advowson be an appropriated one there will generally be both rector and vicar. The rector usually takes the great tithes and the vicar the small tithes. The rector of an appropriated advowson may be either lay or ecclesiastical, but an appropriator has not the cure of souls within the parish, which duty falls on the vicar. As to the obligations attendant thereon, see *supra*.

**Q.**—What is the estate or interest of a "parson" in the church lands, and by what tenure does he hold them? Distinguish between a rector and a vicar.

**A.**—The interest is a life interest in the glebe, tithes, and other dues thereof. The tenure is a freehold or frankalmoign; but the fee thereof is in abeyance. A rector of a non-appropriated advowson is of necessity a spiritual person, and has the cure of souls in the parish, with the *exclusive* titles to all tithes, glebes, &c. If the advowson be appropriated, besides the rector, there is generally a vicar, and the *rector* may be lay or ecclesiastical, but (as appropriator) has not the cure of souls within the parish, which is vested in the vicar thereof, who takes only a *portion* of the emoluments: (2 St. C. 680, *et seq.*, 8th edit.)

**Q.**—What was the origin of vicarages, and what constitutes the difference between a vicarage and a rectory?

**A.**—The rector has a right to all the tithes of the parish, but when grants of tithes were made to monastic houses or other spiritual corporations, it was provided by statutes of Richard II. and Henry IV. that the vicar, who performed the spiritual duties of the parish, should be sufficiently endowed where the tithes were thus appropriated. The tithes thus

separated from the vicar are called great tithes, whilst those to which the vicar is entitled are called small tithes : (Will. R. P. 345, 13th edit.)

*Q.*—What will be the effect as regards merger of subjecting a tithe rent-charge by a settlement to the same limitations as the land out of which it issues, and is anyone who may be entitled under such settlement able to control such effect ?

*A.*—The effect of such limitations will not cause the tithe rent-charge to merge in the land ; but in this case the tenant for life in possession of both land and tithe rent-charge (as well as the tenant in fee or in tail) may by deed or declaration under hand and seal confirmed by the seal of the Tithe Commissioners, merge the tithe rent-charge : (6 & 7 Will. 4, c. 71, s. 71, and 1 Vict. c. 64, ss. 1, 3 ; Burt. Comp. pl. 1214, and note.)

*Q.*—May an advowson be aliened for any estate, and may the next presentation or any number of presentations be granted away ; and if the grantee of the next presentation does not dispose of it in his lifetime or by will, in whom will it vest ? Can the right of presentation to a church that is void be by any means aliened ?

*A.*—An advowson may be aliened for any estate. So the next or any given number of presentations may be granted away. If the owner of the next presentation dies intestate, it will, being a chattel real only, vest in his administrator. The next presentation cannot be bought when the living is empty, the laws against simony forbidding it : (see *Fox v. Bishop of Chester*, L. O. Conv. 135, and notes ; Will. R. P. 346, 13th edit.)

*Q.*—If an advowson descends to coparceners, how and by whom is the presentation to a living to be made ?

*A.*—If the sisters cannot agree in the presentation, the oldest sister is entitled to present alone upon the first vacancy, and so on, according to seniority : (Burt. Comp. pl. 1243 ; *Fox v. Bishop of Chester*, L. O. Conv. 156, in notes.)

*Q.*—If two or more persons are seised of an advowson as joint tenants, how and by whom is the presentation to be made ?

*A.*—Joint tenants before partition ought to join in presentation ; but the bishop may accept the presentation of any of them as made on behalf of the rest : (Burt. Comp. pl. 1224 ; *Fox v. Bishop of Chester*, *sup.*)

*Q.*—Can an advowson or an ecclesiastical benefice be charged, and if so, how ?

*A.*—An advowson may be mortgaged by the patron by deed of *grant*, subject to redemption, &c. : (Coote, Mort. 33, &c., 3rd edit.) But the incumbent cannot charge his living in any way save for the purpose of building or repairing the parsonage house : (Hughes' Conv. 318, 319.)

*Q.*—An advowson is mortgaged in fee—the incumbent dies ; who has a right to present, the mortgagor or mortgagee ? Give the reason why the right of presentation is in the one or the other.

*A.*—Substantially the right of presentation is in the mortgagor (see *Jory v. Cox*, Prec. Ch. 71 ; and notes to *Fox v. Bishop of Chester*, *sup.*) ; for the mortgagee is bound to present the nominee of the mortgagor ; the

mortgagor being considered, in equity, as the real owner: (Coote, Mort. 33, 3rd edit.)

Q.—The legal estate in an advowson is vested in trustees. State what are the rights respectively of the trustees and their *cestui que trust*, and explain them.

A.—As the trustees have the legal estate they must present, but they are bound to present the nominee of the *cestui que trust*: (1 Sm. Comp. 32, 4th edit.)

Q.—A. contracts to sell to B. the next presentation of a living. After contract signed but before completion of purchase the incumbent dies. Who has the right to present?

A.—The vendor, in whom is the legal estate, must present; but he is bound to present the nominee of the purchaser on his completing his purchase. This must be done within six months, or the presentation will lapse to the bishop: (Dart. V. & P. 1004, and see notes to *Fox v. Bishop of Chester*, ante.)

Q.—A. is seised in fee of an advowson—the incumbent dies—then A. dies without having presented to the living; who, on A.'s death, is entitled to present?

A.—The personal representative of A., and not his heir, is entitled to present to the living; for when the vacancy occurs in the lifetime of the patron, and he dies before presentation, it (being as it were fruit fallen) is considered as personal and not real estate<sup>(a)</sup> (1 Sm. Comp. 36, 4th edit.; 2 St. C. 719, 8th edit.)

Q.—What length of title should be shown to an advowson, and state the reasons for your answer?

A.—The title to an advowson should be carried back one hundred years. The reason for this is, that the stat. 3 & 4 Will. 4, c. 27, enacts that (*inter alia*, see sect. 30) no action shall be brought after the lapse of one hundred years from the time at which the clerk obtained possession adversely to the right of the claimant: (sect. 33; Brow. R. P. Stats. 49, 50, 51.)

Q.—In what cases, and in favour of what persons, are covenants to resign a living legal?

A.—When the patron is entitled to the advowson as his private property, he may, by the 9 Geo. 4, c. 94, present any clerk, under a previous agreement (or covenant) with him for his resignation in favour of any one person named, or one of two, each being by blood or marriage an uncle, son, grandson, brother, nephew, or grand-nephew of the patron beneficially entitled. One part of the agreement must be deposited within two calendar months in the office of the registrar of the diocese, and the resignation must refer to the engagement, and state the name of the person for whose benefit it is made: (see Will. R. P. 343, 13th edit.)

Q.—State generally the law of simony.

A.—Simony is the corrupt presentation of anyone to an ecclesiastical

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(a) But it is to be observed, had A. himself been the incumbent, as also patron, the right of presentation would be in his heir, for here the avoidance and descent happen at the same time: (Sm. *sup.*)

benefice for money, gift, or reward; so called from the resemblance it is said to bear to the sin of Simon Magus. Such a presentation is void, and both giver and taker forfeit two years' value to the Crown, to whom also such void presentation passes: (2 St. C. 722, 8th edit.; Will. B. P. 346, 13th edit.)

**Q.**—A. purchases an advowson and on avoidance presents himself. A purchases a next presentation, and on avoidance presents himself. Will either presentation be simoniacal?

**A.**—In the second case the presentation is simoniacal, this clearly coming within the statute of Anne. This statute is not, however, thought to apply to the case of a purchase by a clergyman of the entire advowson with a view of presenting himself: (Will. B. P. 346, 13th edit.) (a)

### 3. *Emblements.*

**Q.**—What is the meaning of the term “*emblements*?”

**A.**—*Emblements* are various vegetables, which, although affixed to the soil, are deemed personal property, and on the death of the owner of the land go to the executor or administrator as against the heir, reversioner, or remainder-man, but not as against a devisee or dowress: (Will. on Exors. 713, 7th edit.) Those vegetables only which are raised annually by labour and manurance (which are considerations of a personal nature) are called *emblements*: (Holth. L. D. 2nd edit.)

**Q.**—D. is a rector, and has sown part of the glebe land with wheat, and dies before harvest time; to whom will this crop belong, and what is such crop denominated?

**A.**—The crop will belong to his executors, and is called *emblements*. But if the successor be inducted before severance, he is entitled to have tithe thereof: (Matt. Exors. 31, 2nd edit.)

**Q.**—Tenant for life sows land in his own occupation, and dies before the crop can be severed. Who is entitled to such crop, and what is such crop called? And suppose the tenant for life had leased the land, not under any express leasing power, and the lessee had sown it, what would be the consequence to the lessee? and state any change in the law on this point). (b)

**A.**—The executors of the tenant for life are entitled to the crop, as *emblements*. If the tenant for life had leased not under a power (c) and the lessee had sown, the lessee would be (or rather would formerly have been) entitled to the crop as *emblements*. For the 14 & 15 Vict. c. 25, has made an alteration in regard to a lessee of a tenant for life or for any other uncertain interest of a farm at rack rent, by compelling such tenant, on the determination by death or cesser of the estate of his landlord, to hold over until the expiration of the then current year's tenancy (paying

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(a) Nor does it apply to the purchaser of a life interest in the advowson, who may present himself: (see *Walsh v. Bishop of Lincoln*, 44 L. J., 244.)

(b) This question is answered by the above: What change has recently been made in the law with respect to claims for *emblements*, where tenancies determine by the death of the landlord, such landlord being tenant for life?

(c) Or under statutory authority.

rent) instead of taking emblements, no notice being necessary to end the occupation : (see sect. 1 ; Will. R. P. 28, 13th edit.)

*Q.*—State the legal rule or maxim, as quoted by Blackstone, applicable to the executors of a tenant for life claiming emblements.

*A.*—The maxim is, "*Actus Dei nemini facit injuriam*:" (2 Bl. C. 122 ; stated 1 St. C. 256, 8th edit.) But if a tenant for life determine his own tenancy, he is not entitled to emblements.

*Q.*—When is a tenant at will, or tenant at sufferance, on the termination of his tenancy entitled to emblements ? and has the tenant any time allowed him to take them, and what ?

*A.*—If the tenant at will sows the land, and before the crop is ripe the landlord puts him out, he is then entitled to emblements, and the tenant is to have ingress, egress, and regress of the land for a reasonable time, to cut and carry away the corn, &c. But it is otherwise if the tenant determines the tenancy ; a tenant at sufferance is not entitled to emblements : (Co. Litt. 55 ; *Richardson v. Langridge*, L. C. Conv. 13, in notes ; Will. R. P. 390, 13th edit.)

## COPYHOLDS.

*Question.*—What are copyhold estates, and their most common incidents or qualities ?

*Answer.*—Copyhold estates are estates holden by copy of court-roll, and in construction of law, *at the will* of the lord of the manor to which they belong, according to the custom of that manor. Their common incidents or qualities, are fines, rents, heriots, and suit of court, escheat and forfeiture to the lord, and his right to the mines, and minerals, and timber, the tenant's limited power of leasing, and their peculiar mode of transfer : (Will. R. P. pt. 3, chaps. 1, 2 ; 1 St. C. ch. 22.)

*Q.*—Explain the origin of copyholds, and by what statute was the further creation of manors prohibited ?

*A.*—Copyholds are said to spring from the ancient tenure of *villeinage*, which was originally absolutely at the lord's will, and the services rendered in respect thereof were of the basest kind ; but the holding has, by immemorial usage, grown into a customary right, and the services have been commuted into money payment. The further creation of manors was prohibited by the statute *Quia emptores* (18 Edw. 1) : (Scriv. Cop. 2, 3, 32, &c., 5th edit.) (*a*)

*Q.*—What led to the passing of the statute *Quia emptores*, and what was the effect of the statute ?

*A.*—The evils arising from subinfeudation led to the passing of this statute, which stopped that practice by enacting that it should be lawful to every freeman to sell at his own pleasure his lands and tenements, but that the feoffee, the purchaser, should hold the same of the chief lord of

(*a*) This question is answered by the above: Can a freeholder constitute part of his estate a manor ? Give the reason for your answer.



the fee by the same services and customs as feoffor held them: (Will. R. P. 18, 13th edit.)

*Q.*—State the difference between freehold and copyhold estates?

*A.*—They differ in regard to the estate itself: thus—(1), copyholds are technically held at the lord's will; (2), the tenants cannot commit waste, as the mines, &c., belong to the lord; (3), they cannot lease the land for more than a year without the lord's license or a custom; (4), they are subject to quit-rents, fines, and heriots; whereas incidents numbered 1, 2, and 3, do not attach to freeholds, and rarely those numbered (4), with the exceptions of an occasional quit-rent, and still less occasional heriot; (5), they differ in their title and mode of transfer, which we need not here particularise: (1 St. O. 626, &c., 8th edit.)

*Q.*—Distinguish the following forms of tenure under a manor (a) a freehold, (b) a customary freehold, (c) a copyhold.

*A.*—In freehold lands of a manor the freehold is in the tenant, who owns therefore the timber and minerals, the tenants hold and possess their own lands in fee subject only to the services due to their lord: (see Wms. on Seisin, p. 49.)

In customary freeholds the freehold is in the lord, who owns the timber and minerals, and the estate is held by copy of court-roll according to the custom of the manor, but not at the will of the lord: (*Ib.*)

Whilst copyholds in addition are held at the will of the lord.

*Q.*—What is a heriot? claimable by whom, from whom, and when?

*A.*—A heriot is the best beast or other chattel which, by the custom of some copyhold manors, the lord has a right to seize on the death or alienation of his tenant; but most usually on his death. However, the right of the lord is now confined to such a chattel as the customary law will enable him to take: (Scriv. Cop. 254, &c., 5th edit.; Will. R. P. 368, 13th edit.; 1 St. O. 629, 8th edit.)

*Q.*—What is the meaning of “copyhold—fine arbitrary” as descriptive of the tenure of Blackacre? and what is the practical effect of such tenure? (*a*)

*A.*—A fine due in respect of copyholds is said to be arbitrary when the sum payable depends upon the will and pleasure of the lord or other person having a right to assess it. But two years' improved value of the land (after deducting quit-rent) has been in practice decided to be a reasonable fine on alienation or descent, and no more is allowed to be taken except under particular circumstances: (1 St. O. 221, 627, 8th edit.; Will. R. P. 358, 13th edit.; Scriv. Cop. 219, 220, 223, 5th edit.)

*Q.*—By what assurance or assurances does a copyholder pass his estate to a purchaser or mortgagee, and is there any and what difference in the form of assurance to a purchaser or a mortgagee? (*b*)

*A.*—A copyholder passes his estate to a purchaser by surrendering it to

(*a*) Also asked thus: Where by the ancient custom of a manor the fines are arbitrary, is there any limit to the amount of fine which the lord can enforce?

(*b*) Also asked thus: In the case of a purchase of copyhold property, what acts are required to vest the estate in the purchaser?



the lord, who regrants it to the purchaser on his subsequent admittance as tenant to the lord. A mortgage of copyholds is effected by surrender, in the same manner, but subject to a condition that, on payment by the mortgagor to the mortgagee of the money lent, together with interest, on a given day, the surrender shall be void. The mortgagee is, however, seldom admitted, until he wishes to enforce his security, on account of his admission involving the payment of a fine, &c.: (see Will. R. P. 352, 375, 533, 13th edit.) (a)

Q.—What is the position of a trustee in bankruptcy with regard to copyhold hereditaments forming part of the bankrupt's estate?

A.—The trustee need not be admitted, but may deal with them in the same manner as if they had been surrendered to such uses as the trustee may appoint, and any appointee of the trustee shall be admitted to the property accordingly: (46 & 47 Vict. c. 52, s. 50 (4).)

Q.—The lord of a manor mortgages it in fee, and afterwards, pending the security, purchases and takes surrender to himself in fee of copyholds held of the manor. Will the mortgagee have the benefit of them as security for his mortgage debt? Give a reason for your answer.

A.—Yes; because any disposition of a manor, whether by way of settlement, mortgage, or devise, will carry with it any lands held of the manor that shall be subsequently purchased by and surrendered to the lord (Scriven on Copyholds, 8th edit., p. 30); and moreover a mortgagor must not diminish the security: (*King v. Lord Yarborough*, 3 B. & C. 91.)

Q.—Suppose a purchased estate to be copyhold, at whose expense is the surrender to, and also the admission of, the purchaser?

A.—In the absence of any express stipulation, the purchaser is liable to the payment of the expense of the surrender and of his own admittance, and the fine payable thereupon: (see Sug. Conc. V. 420; Scriv. Cop. 218, 5th edit.)

Q.—If the vendor contract to surrender and assure a copyhold estate at his own expense, is he bound to pay the lord's fine?

A.—No; the title is perfected by the admittance, and the fine is not payable till afterwards: (see Sug. Conc. V. 420; Scriv. Cop. 218, 5th edit.)

Q.—A., the owner of a copyhold property in a manor where the custom of Borough English prevails, contracts to sell it, and then dies without having completed the sale, leaving several sons, and a will, which, however, is inoperative as to real estate. What must be done to give a good title to the purchaser, and would any expense caused by this fall upon him or upon A.'s estate; and to whom should the purchase money be paid, and who would be proper parties to the ultimate surrender to the purchaser?

A.—The estate descends to the youngest son (*ante*, p. 182), who must be admitted and surrender to the use of the purchaser. The purchase money is payable to the executor, who, with the parties, beneficially interested, should join in the usual deed of covenant for title.

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(a) A deed of covenants invariably accompanies the surrender of copyholds, either on a purchase or mortgage.

The fine on the admittance of the son will fall on A.'s estate; and any other expenses occasioned to either side by the death of A. will have to be borne by that side.

Q.—Explain the meaning of the phrase “customary heir,” and give an instance.

A.—The descent of an estate in fee simple in copyholds is governed by the custom of descent which may happen to prevail in the manor; in some the custom of gavelkind prevails and in others that of Borough English. The phrase “customary heir” means, therefore, the person who, under the particular custom prevailing in such manors, or in the case of freeholders subject to such customs, is the heir, as distinguished from the heir under the Inheritance Act.

Q.—A., in 1840, purchased the manor of Stoke, and died intestate, whereupon the manor descended to his son B., who purchased the copyhold lands of one of the tenants of the manor, and died intestate. Who will be the stock of descent for the land purchased by B., and why?

A.—The copyhold lands being conveyed to the lord of the manor, the copyhold tenure was extinguished, but the lands continued to be and would pass as part of the manor (*St. Paul v. Dudley and Ward*, 15 Ves. 167); consequently, as on B.'s decease A. would be the stock of descent for the manor, he would also be so for the land purchased by B.

Q.—Sir John Chudleigh granted the manor of Hescot to trustees and their heirs to the use of William Dillon for ten years, with remainder to the use of Richard Chudleigh, his heirs and assigns for ever. Can you find any, and what, fault with these limitations?

A.—These limitations are unobjectionable.

Q.—A., being a surrenderee of copyhold estate, but not admitted, assigns his interest to B. Is the lord compellable to admit B. on payment of a single fine; and how would the case stand if, instead of a surrender to A., there had only been a covenant to surrender?

A.—In the first case put A. must be admitted and complete his title before he can pass a good title to B., and in such a case a double fine would be due. If there had only been a covenant to surrender to A., and he assigns that interest to B., B. may call upon A.'s vendor to surrender to him, and of course only one fine is due, as there is only one admittance: (see 1 St. C. 628 and note, 8th edit.; *Scriv. Cop.* 117, 144, 199, 5th edit.)

Q.—Describe, generally, the nature of customary freeholds.

A.—These are a peculiar species of copyholds chiefly prevailing in the north of England. The freehold and fee are both in the lord; but they are *not* held at his will as copyholds are. In general, however, their incidents are similar to those of common copyholds; thus, the tenant cannot grant a lease without his lord's licence: (*Co. Cop. s. 32*; *Will. B. P.* 356, 13th edit.)

Q.—Describe how customary freeholds are conveyed *inter vivos*.

A.—Customary freeholds are conveyed in some cases by deed of grant, instead of by surrender; to complete the title, however, the tenant must

be admitted ; so they may be transferred by bargain and sale and admittance : (see But. Comp. pl. 1283 ; Scriv. Cop. 414, &c., 5th edit.)

Q.—Is there any mode by which a testator seised of copyhold estate, and intending that it should be sold after his decease, can avoid the necessity of the admittance of the trustees of his will and the payment of a fine by them before a sale can be effected, and, if so, how ? (a)

A.—Instead of devising the copyhold estate to trustees to sell, the will should contain a mere direction that the trustees should sell the estates, as by so doing the purchaser will be at once admitted, and the fine and expense of the admittance of the trustees will be avoided. This mode, however, is only applicable where the copyholds are to be sold immediately after the testator's death : (Scriv. Cop. 234, 5th edit. ; Will. R. P. 380, 13th edit.)

Q.—If copyholds are devised to three trustees, how is the fine on their admittance calculated ?

A.—Trustees being joint tenants, pay but one fine, But the fine would be calculated thus : two years' value for the first life, half of that on the second, and half of that sum on the third : (Scriv. Cop. 220, 222, 5th edit.)

Q.—A devisee of copyhold estate dies without being admitted. Will a devise by him operate to pass it, and under what authority ?

A.—A devisee of copyhold estate is empowered to devise his interest although not admitted by the 1 Vict. c. 26, s. 3 : (Will. R. P. 378, 13th edit. ; But. Comp. pl. 1289, n.)

Q.—What is requisite to be done by a devisee of copyholds to complete his title ?

A.—He must deliver a copy of the will to the lord, or his steward, or deputy, which, without presentment, is sufficient to authorise its entry on the court rolls, and the admittance of the devisee, without a court being held : (Will. R. P. 378, 13th edit.)

Q.—Give the mode of creating and transferring equitable interests in copyholds on sale or mortgage ?

A.—Although copyholds are not within the Statute of Uses, an equitable interest may be created by surrendering them to the use of trustees, as joint tenants, upon such trusts as will, in equity, effect the settlement required. The trustees are thus tenants to the lord, and have the legal estate. The *cestui que trust*, therefore, cannot surrender his tenancy, as he has not got one, but he may assign his interest by deed. To this rule, married women and tenants in tail form an exception ; for the former may transfer their interest by surrender or deed, and the latter may bar the entail by the like means : (Will. R. P. 381, &c., 13th edit.)

Q.—If copyholds were devised to a trustee upon trust for A. for life, and after his death to B. absolutely, and B. should sell his remainder, by

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(a) Also asked thus : In making the will of a testator who has both freeholds and copyholds which he wishes on his death to be sold and divided amongst his family, is there any and what course to be taken as to the copyholds preferable to a devise to trustees upon trust to sell, and if so, why preferable ?

what assurance should the property be conveyed to a purchaser, the trustee having been admitted ?

A.—By deed of assignment for B. has only an equitable estate in remainder ; he cannot, therefore, surrender his interest. The purchaser should, in addition to the assignment, obtain a covenant from B. that he will surrender the legal estate when he obtains it, or get the trustee to do so on A.'s death. The title being eventually completed by admittance : (see Scriv. Cop. 144, 5th edit.)

Q.—What is the effect of grants of copyholds made by a person who, having been tenant *pur autre vie* of a manor, holds over after death of the *cestui que vie*, and so becomes tenant at sufferance ? Give reasons.

A.—The grants may be avoided after the recovery of possession by the rightful lord. For whatever estate the lord may have in the manor he must be *legitimus dominus pro tempore* : (*Hous v. Artois*, 2 Leo. 45 ; s. c., Ow. 28 ; s. c. Mo. 236 ; see Scriv. Cop. 72, 78, 5th edit.)

Q.—A person having no right in a copyhold is admitted tenant by the lord ; what, if any, act by the person having the right will perfect the title of the persons admitted ?

A.—If the person having a right to be admitted releases that right to the person who has been wrongfully admitted, and who is in possession, it will operate as an extinguishment of such right : (see Co. Cop. s. 36 ; Scriv. Co. 131, 5th edit.)

Q.—Of what tenure will an allotment under an Inclosure Act, made in respect of a copyhold estate, be, supposing the Act to be silent in this respect ?

A.—An allotment in respect of copyhold lands, if made under the Commons Inclosure Act (8 & 9 Vict. c. 118), will be of copyhold tenure unless otherwise specified (s. 94), and by 17 & 18 Vict. c. 97, s. 8, the same is enacted with respect to copyhold rights ; formerly it was of freehold tenure : (see Burt. Comp. pl. 1258, n.)

Q.—To whom, in the absence of any special custom to the contrary, belong the timber and minerals upon and under the waste land of a copyhold manor, and to whom the timber and minerals under copyhold lands ?

A.—To the lord in each case ; but as to the copyholder's land, the lord cannot come upon it to work the mines or to cut the timber without the tenant's consent : (see Will. R. P. 355, 13th edit. ; Scriv. Cop. 293, 302.)

Q.—Could the court (equity division) make a decree for partition of copyhold estate as of freehold, and under what authority ?

A.—Yes, under the authority of the statute 4 & 5 Vict. c. 25, s. 85.

Q.—Can the lord "approve" part of the waste lands of the manor ; and, if so, under what law and to what extent, and subject to what restrictions, if any ?

A.—Under the statute of Merton (20 Hen. 3, c. 4) every lord may inclose or "approve" against common of *pasture* so much of the wastes as he pleases, provided he leaves a sufficiency of common for the tenants : (1 St. C. 654, 8th edit. ; Scriv. Cop. 373, 5th edit.)

**Q.**—What leases can a copyhold tenant make :

**A.**—He can only grant a lease of the lands for one year ; and a demise for a longer term would cause a forfeiture to the lord, unless authorised by him, or by a special custom of the manor : (Will. R. P. 355, 13th edit. ; 40 & 41 Vict. c. 18, s. 56 ; 45 & 46 Vict. c. 38, s. 14.)

**Q.**—Can copyholds be entailed, and by what means ?

**A.**—The statute *De Donis* does not apply to copyholds : therefore they can only be entailed when there is a custom to that effect. In manors in which there is no custom to entail, a gift of copyhold estate to a man and the heirs of his body will give him an estate analogous to a fee simple conditional, which a freeholder would have acquired under such a gift before the passing of the statute *De Donis* : (Scrip. Cop. 44, &c., 5th edit. ; Will. R. P. 362, 13th edit.)

**Q.**—State the mode of barring legal and equitable estates tail in copyhold lands, and the mode in which the protector of a settlement may give his consent to a copyholder barring his estate tail whether legal or equitable.

**A.**—A legal entail in copyholds must be barred by surrender ; but if the entail be equitable then it may be barred either by surrender or deed. The surrender or deed requires no enrolment, except an entry on the court rolls of the manor. (a) If the protector consents by deed, it must be executed either at the time or before the surrender is made, and be entered on the court rolls. If the consent is not given by deed it must be given to the person taking the surrender, barring the entail : (see 3 & 4 Will. 4, c. 74, ss. 50-54 ; Will. R. P. 364, 13th edit.)

**Q.**—What powers of alienation are possessed by tenants in tail of copyholds held of manors (a) in which there is a custom to entail ; and (b) in which there is no custom ?

**A.**—(a) The 3 & 4 Will. 4, c. 74, now provides in this case a simple conveyance by surrender instead of the old cumbrous machinery of a customary recovery, or a forfeiture and regrant.

(b) A tenant in tail where there is no custom to entail has an estate analogous to the fee simple conditional which a freeholder would have acquired under such a gift, before the passing of the statute *De Donis*. Before he has issue he will not be able to alien more than his life estate, but after issue is born to him he may alienate the whole estate : (Wms. R. P. 361-3, 13th edit.)

**Q.**—Explain in a familiar manner the services rendered in respect of copyholds, and to whom ; and the reasons for the general discontinuance and commutation of such services into money payments.

**A.**—The services were rendered to the lord of the manor, and consisted of fines, heriots, rents, reliefs, and customary services ; also the lord's interest in the timber growing on the copyhold lands. The reasons for their discontinuance were, that they were found inconvenient to the copy-

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(a) The deed must, however, be entered on the court rolls of the manor within six months after the execution of the deed : (*Honeywood v. Foster*, 4 L. T. Rep. N. S. 785 ; 9 W. R. 853.)

hold tenant, and without any sufficient corresponding advantage to the lord: (Will. R. P. 367, 13th edit.)

*Q.*—Can the lord of a copyhold manor be compelled to enfranchise? If so, in what case and by whom; and how are the expenses of the enfranchisement to be borne?

*A.*—By the 15 & 16 Vict. c. 51, it is provided that at any time after the next admittance to any lands on or *after* the 1st July, 1853, either the lord or tenant may compel enfranchisement: (see sects. 1, 30.) And the 21 & 22 Vict. c. 94, enacts that any lord or tenant of any lands, to which the last admittance took place *before* the 1st July, 1853, may compel enfranchisement; but before the tenant can do so, he must pay or tender such a fine, &c., as would be due on admittance or death, and two-thirds of the stewards' fees thereon. The party wishing to enfranchise gives notice to that effect to the other. The consideration to be paid to the lord for such enfranchisement (unless agreed to the contrary) is to be ascertained, under the direction of the copyhold commissioners, upon a valuation to be made as pointed out by the Act, to which the student is referred. (*a*) The award of enfranchisement is then made, and the cost thereof is to be borne by the party requiring it: (15 & 16 Vict. c. 51.)

*Q.*—What elements of value are taken into account in arriving at the consideration money to be paid for the enfranchisement of copyholds?

*A.*—By 15 & 16 Vict. c. 51, s. 16, in making any valuation under this Act, the valuers shall take into account the facilities for improvement, customs of the manor, fines, heriots, reliefs, quit rents, chief rents, escheats, forfeitures, and all other incidents whatever, of copyhold or customary tenure, and all other circumstances affecting or relating to the land which shall be included in such enfranchisement, and all advantages to arise therefrom, and shall make due allowance for the same.

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### HUSBAND AND WIFE—DOWER, &c.

*Question.*—What are the rights of a husband with respect to his wife's freehold and copyhold estates? (*b*)

*Answer.*—Where married before 1883 all the real estate of the wife in possession, or accrued to her before that date, and not settled to her separate use, is by law vested in the husband and wife during the coverture in

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(*a*) The effect of it, however, is that when the rights to be computed consist of heriots, &c., at fixed rates, or if the land be rated to the poor-rate at less than 20*l.* per annum, the valuer is to be appointed by justices at petty session held in the division in which the manor is situate; but in other cases by valuers, one appointed by the lord, the other by the tenant. The commissioners have power to award enfranchisement on the terms of the valuation, and may confirm the same, which confirmation is to have the effect of a deed of enfranchisement under the provisions of the Copyhold Acts, and the award of enfranchisement under the seal of the Commissioners is made conclusive evidence of the lord's right to enfranchise. The consideration may be charged upon the land, as may also the expenses, the latter to be discharged by periodical payments not exceeding fifteen years; and the charges so made are to be a first charge on the land, having priority over all charges, mortgages, and incumbrances whatsoever, except tithe commutation rentcharges, and charges for drainage under the statute for that purpose.

(*b*) This question has also been asked in the Common Law Division.



right of the wife. The husband is entitled to the profits and management, and may lease it for twenty-one years, which will bind the wife and her representatives; but, subject to this, he cannot convey or charge the lands for any longer period than while his own interest continues. The husband is, under certain circumstances (see *post*), entitled to hold the wife's land after her death as tenant by the curtesy: (see 2 St. C. 262, *et seq.*, 8th edit.) If married since 1882, the husband is (apart from any settlement) only entitled to curtesy.

The above remarks, subject, however, to particular custom, apply to copyholds: (see L. T. p. 490, Aug. 10, 1861.)

*Q.*—Who is entitled to receive and give a discharge for a legacy given by a testator who died in 1882 to a woman married at the time of his death, the legacy not being for her separate use, and not having become payable till this year?

*A.*—As the legacy had accrued before 45 & 46 Vict. c. 75 (see sect. 5), the husband would be the proper person to give a receipt, unless the legacy was under 200*l.*, when, by sect. 7 of the Married Women's Property Act, 1870, the wife, if married after 9th August, 1870, alone could give a good receipt.

*Q.*—What were the most important alterations made in the law as to the property of married women by the Married Women's Property Acts, 1870 and 1874?

*A.*—By 33 & 34 Vict. c. 93, all wages and earnings subsequent to the Act are made separate estate, and her investments in savings banks, and the funds, fully paid up shares, or stock in a joint-stock company, and friendly and benefit societies, &c., may be registered as separate estate. Her receipt alone is a good discharge for the above, and she may maintain an action for the same in her own name. With respect to a woman married after the Act, personal property to which she shall become entitled as next of kin or one of the next of kin of an intestate, or any sum of money not exceeding 200*l.* under any deed or will, shall belong to her for her separate use, and also the rents and profits of real estate descending to her (subject to any settlement affecting the same); but a husband shall not by reason of any marriage between the commencement of this Act and July 30, 1874, be liable for the debts of his wife contracted before marriage, but her separate estate remains liable, and provision is also made for insuring her own or husband's life for her separate use. By 37 & 38 Vict. c. 59, a husband married after that Act is liable for his wife's debts and liabilities before marriage to the extent that her property has, or might with reasonable diligence have, been received by him. Both these Acts are now repealed, except as to rights acquired thereunder by 45 & 46 Vict. c. 75.

*Q.*—What interest and power does the husband take in and over the following property of the wife: her personalty in possession, her chattels real, her *choses in action*? and what effect has the death of husband or wife on this interest? (*a*)

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(*a*) Also asked thus: A lady possessed of personalty, and with various debts owing to her, marries: what interest does the husband acquire by the marriage in and over the personalty and debts owing respectively, during the coverture, or in the event of his surviving her?



A.—Formerly, if not settled to her separate use, the wife's personal chattels in possession belonged to the husband absolutely, with the exception of her *paraphernalia*.

Her chattels real he became possessed of by marriage in her right, and he was entitled not only to the profits of them, but he might also dispose of them as he pleased during the coverture, and they were liable for his debts; and if he survived her, they were absolutely his. But he could not devise them by will; and if he made no disposition of them in his lifetime, and she survived him, they went to her, and not to his executors.

The wife's *choses in action* did not become the husband's until he reduced them into possession; and if he died before this was done, they remained to the wife; so, if she died before he had reduced them into possession, they formed part of her estate, to which the husband was entitled to administer, and so became the owner thereof, subject to payment of her debts: (see 2 St. C. 262, *et seq.*, 8th edit.) But now, by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), if married after 1882, the husband will not be entitled, further than as administrator on his wife's death intestate, to any interest in these classes of property, nor, if married before 1883, where such property accrues to the wife afterwards.

Q.—What claims has a wife upon her husband's estate in case of his bankruptcy, for money, part of her separate estate lent to him for the purposes of his trade?

A.—She is only entitled to claim a dividend after all claims of other creditors for valuable consideration have been satisfied: (45 & 46 Vict. c. 75, s. 3.)

Q.—If a married woman is entitled to money secured by bond, and the husband dies in her lifetime before the amount due thereon is paid, who becomes entitled thereto?

A.—The bond being a *chose in action* of the wife's not reduced into possession during the coverture, it survives to her: (see Chit. Cont. 155, 156, 11th edit.; and *supra* as to effect of recent legislation.)

Q.—If a husband and wife mortgage the leasehold estate of the wife, not belonging to her for her separate use, to whom will the equity of redemption belong if the husband survive the wife; and to whom, if the wife survive her husband?

A.—Each will take it by survivorship: (see 2 Pow. Mort. 714, 5th edit.; also *Clark v. Burgh*, 9 Jur. 679.)

Q.—An English woman of full age, possessed of two leasehold houses, marries without a settlement, her husband alone mortgages one house and sells the other, receiving the mortgage and purchase moneys respectively; he then dies in his wife's lifetime. What are the rights (if any) of the widow to or against the mortgaged house, the sold house, and her husband's estate respectively?

A.—The husband has perfect power to dispose of his wife's terms of years, if not separate estate, either by sale or mortgage. The equity of redemption in the mortgaged house survives to the wife, but she has no claim against his estate: (see Will. R. P. 408, 13th edit.)

**Q.**—A. puts certain railway shares into his wife's name, but continues to receive the dividends both during his wife's lifetime and after her decease. On his death can the executor get the shares transferred into his name, and how?

**A.**—A.'s executor must first take out administration to A.'s wife's estate, when he can obtain a transfer of the shares.

**Q.**—If a man purchases stock in the joint names of himself and his wife, what power of disposition over it has he in his lifetime and by will?

**A.**—If a man purchases property in the joint names of himself and his wife, the presumption is that he intended an advancement to his wife, and they will be joint tenants during their joint lives, and the survivor can dispose of it by deed or will. In the case of stock, however, the Bank of England allows a transfer by the husband alone of stock standing in the joint names of himself and wife.

**Q.**—State the nature and principal incidents of "separate estate."

**A.**—Separate estate is property which a married woman, under certain circumstances, is entitled to retain for her separate and independent use: (Holth. L. D.) Its principal incidents are that it is free from the debts and control of the husband; but the wife may alone, unless prevented, assign or charge it with her debts. It may, contrary to the general rule, be rendered inalienable during the coverture: (see *Tullett v. Armstrong*, 1 Beav. 1; *Hulme v. Tenant*, 1 L. C. Eq. 394, 2nd edit.; *Taylor v. Meads*, 12 L. T. Rep. N. S. 6.)

**Q.**—I have before me two deeds dated in 1860. Under one a married woman has a separate reversionary interest in land settled, with a power to sell and re-invest in the purchase of other estates. Under the other, a married woman has a like interest in land held upon trust for sale and conversion. In each case a sale has been made and the purchase moneys are held in trust, and it is desired to effect a charge on them. Must the deed of charge be acknowledged in both cases or in one only, and if so, which? Would the question be affected by the deed in either case, being the woman's marriage settlement? Can you give cases?

**A.**—In equity a married woman can dispose of her separate estate when the alienation is not restricted, either by instrument *inter vivos* not acknowledged under the Fines and Recovery Acts, or by will: (see Lord Westbury's judgment in *Taylor v. Meads*, 34 L. J., N. S. 203, Chan.) No acknowledgment of the assignment will therefore be necessary in either case, and only notice to the trustees in the latter. (a)

**Q.**—Advise on the powers of alienation by deed or will which the wife of Sir John Plausible has over the following property belonging to her previous to 1870:

(a) A reversionary interest in a sum of stock passing under her late aunt's will.

(b) A like interest in 15,000*l.* London and North-Western Railway Stock, which will devolve to her absolutely on her husband's

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(a) This question was no doubt intended to test the student's knowledge of conversion, and of the Act 20 & 21 Vict. c. 57, but from the question being improperly framed, and applying only to separate use property, these points are immaterial.

death under the provisions of the settlement made on their marriage.

(c) Over an estate in Middlesex, devised by her father to her separate use in fee simple.

(d) Over an estate in the same county which descended to her as heiress of an uncle who died intestate.

A.—(a) By means of 20. & 21 Vict. c. 57, Lady Plausible, if the will was made after 1857, may, by deed executed with concurrence of her husband, and with all the formalities required by 3 & 4 Will. 4, c. 74, *effectually* assign her interest to a purchaser.

(b) The Act does not apply to interests taken under her marriage settlement, so Lady P. cannot bind herself surviving by any assignment of this stock.

(c) In equity Lady P. can effectually dispose, either by will or deed of the estate in Middlesex limited to her separate use: (see *Taylor v. Meads*, 34 L. J. (Ch.) 203.)

(d) Here, with the concurrence of her husband, and with the formalities required by 3 & 4 Will. 4, c. 74, Lady P. can convey the fee by deed—but cannot dispose of the estate by will.

Q.—What purposes were served by the mode of conveyance called a fine, and whence did it derive its name? How are the like purposes served now?

A.—A fine was used for barring an entail so far as the issue were concerned, but it did not affect remainders over; it was also used by married women to pass their interest in real estate; it was a fictitious action commenced and then compromised by leave of the Court, whereby the lands in question were acknowledged to be the right of one of the parties. It was called a fine from its having anciently put an end as well to the pretended suit as to all claims not made within a year and a day afterwards—a summary method of ending all disputes, grounded on the solemnity and publicity of the proceedings as taking place in open Court.

Fines were abolished by the Fines and Recoveries Act (3 & 4 Will. 4, c. 74). An estate tail is now barred, so far as the issue are concerned, by deed enrolled in Chancery within six months of execution, without the consent of the protector, whilst a married woman conveys her interest in real estate by deed, in which her husband joins, she being examined separately from her husband as to her consent thereto, and it must be acknowledged before a judge of the High Court, or a County Court, or a commissioner appointed for the purpose. A memorandum of the acknowledgment must be indorsed on the deed, and no certificate of it need now be filed: (see Will. R. P. 49, 233, 13th edit., and 45 & 46 Vict. c. 39.)

Q.—In what cases is acknowledgment of deeds relating to the real estate of married women still necessary, and how is the mode of taking acknowledgments simplified?

A.—It is necessary only where the property was acquired previously to 1883, or possibly where she is a trustee. One commissioner is now sufficient to take the acknowledgment, and no affidavit or certificate is now necessary. The memorandum of acknowledgment signed by the commissioner or judge being all that is required: (45 & 46 Vict. c. 39,

s. 7.) The memorandum must be in the form given in the Rules of December, 1882: (see rr, 3, 4.)

**Q.**—A. and B. (two spinsters) were tenants in common in fee of a farm. A. married about ten years ago, B. married last month (January, 1884), and both their husbands are living. By what means, if by any, can the interests of A. and B. in the farm be effectually conveyed to a purchaser, and who are the necessary parties to the conveyance?

**A.**—A. and her husband and B. are the necessary parties, and must join in conveying to the purchaser. The deed must be acknowledged by A.: (see preceding answer, and 45 & 46 Vict. c. 75.)

**Q.**—How can a married woman convey her copyhold estates? Distinguish as to the legal and equitable estate therein.

**A.**—She disposes of her legal interests in copyholds by surrender, in which her husband joins, she being examined apart from her husband by the steward of the manor. But her equitable estate therein she may pass either by surrender or deed acknowledged: (1 St. C. 640, 8th edit.; Will. R. P. 377, 382, 13th edit.) If the property came to her, or she was married after 1882, she can dispose of it as a *feme sole*: (45 & 46 Vict. c. 75.)

**Q.**—Does the statute 3 & 4 Will. 4, c. 74, apply to the equitable as well as to the legal estate of a married woman, or to leaseholds for years?

**A.**—It applies to both legal and equitable estates: (see sect. 77; but see *Taylor v. Meads*, to the effect stated, *post.*) The husband may alone absolutely dispose of his wife's leaseholds for years; unless they belong to her for her separate use, and of her reversionary leaseholds if there is a chance of their falling in during coverture: (*Donne v. Hart*, 2 Russ. & Myl. 363; Will. R. P. 408, 13th edit.)

**Q.**—Land is given to such uses as A., an unmarried woman, should appoint, and in default, to her in fee. Can a good title be made by A. after marriage without the concurrence of the husband, or what further is necessary to complete the conveyance?

**A.**—A good title can be made by A. without the concurrence of her husband, by exercising her power) if the power, at the time it is exercised, is valid and subsisting: (1 Sug. Pow. 184, 185, 194, 6th edit.) But if the power should have become suspended or extinguished at the time it is attempted to be exercised, or if a married woman having also, as in the case put, an ownership in the lands, should convey them, omitting the formalities of the power, a good legal title cannot be made without the husband joins in the deed, and it be duly acknowledged by the wife: (3 & 4 Will. 4, c. 74, s. 78.) If the land was given, or the marriage took place after 1882, she can dispose of it as a *feme sole*: (45 & 46 Vict. c. 75.)

**Q.**—State in detail the three interests which married women may pass by a deed acknowledged before a judge or commissioners.

**A.**—1. She may, not being tenant in tail, dispose of or release lands of any tenure, or money subject to be invested in lands, or any estate, vested or contingent, which she alone or she and her husband have therein; also release or extinguish any power vested in her in regard to any lands of

any tenure, or in any such money, by deed acknowledged in which the husband joins: (3 & 4 Will. 4, c. 74, s. 77; 8 & 9 Vict. c. 106, s. 6.)

2. She may also in the same mode disclaim any estate in any tenements or hereditaments in England of any tenure: (8 & 9 Vict. c. 106, s. 7.)

3. She may also by deed acknowledged, &c., dispose of her reversionary interest in personal estate as detailed *post*, p. 237: (20 & 21 Vict. c. 57.) For effect of 45 & 46 Vict. c. 75, see *supra*.

Q.—If a power be reserved to a *feme sole, as such*, to dispose of her estate by deed or will, can she exercise such a power during coverture? State the proper mode of framing a power enabling her to do so in either case.

A.—If the power be given to a *feme sole, as such*, it would seem that it cannot be exercised during coverture. For it is laid down that “a power given expressly to a woman ‘*being sole*’ cannot be exercised by her during coverture:” (1 Sug. Pow. 185, 6th edit.) It is usual in framing the power to expressly declare that the woman shall be at liberty to appoint “whether *covert* or *sole*:” (see a form 2 Prid. Conv. 464, 9th edit.)

Q.—In case of the settlement of real property in fee to the separate use of a married woman without restraint on anticipation, what is the extent of her power of alienating or charging the same?

A.—She has full power *in equity* to alienate or charge the property either by deed or will, without the consent or concurrence of her husband: (see *Taylor v. Meads*, 12 L. T. Rep. N. S. 6; Will. R. P. 227, 13th edit.) And if the property was acquired, or the marriage took place after 1882, she can now dispose of it as a *feme sole*: (45 & 46 Vict. c. 75.)

Q.—If the property be given to the separate use of a woman then unmarried, will the restriction be valid on her subsequent marriage?

A.—Yes; property may be secured to an unmarried woman, with a clause against anticipation, and in such a case it will be good against the marital rights of any future husband: (St. Eq. § 1384.) But it was formerly thought otherwise: (see *Massey v. Parker*, 2 Myl. & Ke. 174.)

Q.—When real property is limited (not in contemplation of marriage) to the separate use of an unmarried woman, without power of anticipation, what are her rights in such property while she remains unmarried, and what are the rights of her husband in it, if she subsequently marries without a settlement?

A.—She is not thereby prevented from disposing of the property while she continues unmarried. But if she afterwards marries without a settlement, the clause against anticipation will operate, and the property will be free from the husband's marital rights (St. Eq. § 1384; Sm. Man. § 852); but by 44 & 45 Vict. c. 41, s. 39, with consent of the married woman, the court may by judgment or order bind her interest in such property if for her benefit.

Q.—Can a married woman by any, and what, means sever a joint tenancy of real estate?

A.—Yes, by deed acknowledged, &c.; for the statute 3 & 4 Will. 4,

c. 74, empowers her to dispose of any estate which she, either alone, or she and her husband in her right, may have in lands of any tenure : (see 1 St. O. 474, 8th edit.) She has the same powers as a *feme sole* if married after 1882, or in respect of property acquired thereafter : (45 & 46 Vict. c. 75, s. 1.)

*Q.*—What is the power of disposition given to the wife, with concurrence of the husband, over the wife's future or reversionary interest in personal estate by the Act affecting instruments made after 1857, and how to be exercised ?

*A.*—By this Act (20 & 21 Vict. c. 57) a married woman may by deed dispose of her reversionary interest in personal estate to which she becomes entitled under an instrument made after 31st December, 1857 (except an interest taken under her marriage settlement), unless restrained from so doing by the instrument under which she takes. Her husband joins in the deed, which must be acknowledged as required by the 3 & 4 Will. 4, c. 74. Acknowledgment is unnecessary if the case comes within the Married Women's Property Act, 1882.

*Q.*—Suppose that a wife is entitled on the death of a tenant for life, now living, to a sum of stock now standing in the names of trustees, and that her husband makes an assignment of this reversionary interest to a purchaser. How will the benefit accruing to the purchaser by virtue of this assignment vary according as the husband, the wife, or the tenant for life, may happen to die first ? What would be the effect if an assignment of his life interest to the wife were obtained from the tenant for life ?

*A.*—If the husband die first the wife is entitled to the reversionary interest.

If the wife die first the husband takes it as her administrator, subject to the payment of his wife's debts, and must then account for it to the purchaser.

If the tenant for life die first the trustees may transfer the stock to the husband's assignee, unless the wife issues a writ to enforce her equity to a settlement, in which case half the fund will probably be ordered to be settled upon the wife and her children.

It will make no difference if the tenant for life assign his interest to the wife, as it is contrary to the general principle of equity to allow the rights of parties to be affected by any merger or extinguishment of interest : (see Will. P. P. 10th edit., p. 426.)

When the case falls within the Married Women's Property Act, 1882, the husband cannot assign more than his own interest as administrator.

*Q.*—Can a husband convey his wife's reversionary or contingent interest in leaseholds for years with or without his wife, or her reversionary interest in personal chattels ?

*A.*—Subject to 33 & 34 Vict. c. 93, and 45 & 46 Vict. c. 75, and to its vesting during the coverture, the husband may, without his wife's consent, convey her reversionary leaseholds for years : (St. Eq. §§ 1410, 1413.) As to the latter part of this question, see *supra*.

*Q.*—What are a married woman's powers of disposition over personal estate settled to her separate use absolutely ?



A.—She has in equity full power to dispose of it at her pleasure, either by deed or will, if there be no restraint put upon its alienation by the instrument giving it to her (St. Eq. § 1393); unless it be reversionary property settled upon her or agreed to be settled upon her on her marriage: (20 & 21 Vict. c. 57.)

Q.—Where a life interest in money is limited to an unmarried female for life for her separate use without power of anticipation, what are her powers over it while she remains unmarried; and what are the powers of her and her husband, or either of them, after marriage, without a settlement?

A.—While she continues unmarried she is not thereby deprived of the powers of alienation; but if she marries without a settlement the restraint on alienation will then attach, and, during the coverture, neither she, nor she and her husband, will have any further power than that of receiving the income as it grows due (but the court may bind her interest under 44 & 45 Vict. c. 41, s. 39: (*ante*, p. 236.) On her widowhood, however, her powers of alienation will again revive: (Will. P. P. 433, 10th edit.)

Q.—If a married woman is appointed executrix of a will, what joint or separate powers have the executrix and her husband over the testator's estate?

A.—Formerly she could not accept the office without the consent of her husband, and having accepted it with his consent, she was unable, without his concurrence, to perform any act of administration which might be to his prejudice; whilst he, on the other hand, might release debts due to the deceased, or make assignment of deceased's personal estate, without his wife's concurrence; for as the general rule of law was that a husband and wife were but one person, the power, and with it the responsibility, were vested in the husband. Nevertheless the wife might continue the executorship by her will: (Will. P. P. 369, 10th edit.) And now by sect. 18 of 45 & 46 Vict. c. 75, a married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person may sue or be sued, and may transfer any interest in stock, &c., in that character without her husband; and by sect. 24 the word contract in that Act is to include the acceptance of the office of executrix or administratrix, and the provisions of the Act as to liabilities of married women extend to devastavits committed by any married woman being an executrix or administratrix either before or after her marriage, and her husband is not to be subject to such liability unless he has acted or intermeddled in the administration.

Q.—If jewels or other personal chattels are given to the separate use of a married woman, but without naming a trustee, and the husband receives possession of them, is the wife protected on any, and if any, what principle?

A.—The wife is protected in equity; the husband being compelled to hold the property independently of his marital rights and simply as a trustee, as the property is given to the separate use of the wife, and does not form part of her paraphernalia, and equity effectuates the intention of the parties: (St. Eq. §§ 1377, 1380; Will. P. P. 431,



10th edit.) And now by 45 & 46 Vict. c. 75, she may hold and dispose of them as a *feme sole* without the intervention of any trustee.

Q.—In what cases must the husband obtain letters of administration in order to obtain his wife's chattels, real or personal?

A.—When the chattels real of the wife were not vested in his possession in her right, in her lifetime; or, if he has not reduced her *choses in action* into possession during her life, he must take out administration to become entitled: (Alln. Wills & Adma. 233, 248, 3rd edit.)

Q.—What is dower?

A.—At common law (applying to widows married on or before 1st Jan., 1834) it is an estate for life in a third part of the lands of inheritance of which her husband was solely seised in possession at *any time* during coverture, and of which lands any issue she could have had might have inherited. So under the 3 & 4 Will. 4, c. 105, the amount is a third; but it does not attach until the husband's death; however, the lands need not be in possession, and it extends to equitable estate: (Will. R. P. 234, 13th edit.; 1 St. C. 269, &c., 8th edit.; *et infra*.)

Q.—What is the difference between common law dower and dower as regulated by the 3 & 4 Will. 4, c. 105?

A.—At common law, dower attaches on all legal estates of inheritance in possession of which the husband is solely seised at any time during the coverture, &c. And after it has once attached it has preference over all the husband's debts, conveyances, &c. But the widow cannot at common law claim dower out of equitable estates. As to women married after the 1st Jan. 1834, the 3 & 4 Will. 4, c. 105, has granted dower out of equitable as well as legal estates of inheritance in possession, excepting, of course, estates in joint tenancy; also out of lands to which the husband had a right merely. On the other hand, no widow is entitled to dower out of lands which have been absolutely disposed of by the husband in his lifetime, or by his will. And all partial debts, estates, &c., created by the husband are effectual as against the widow's dower. The husband may also bar her right, either wholly or partially, by any declaration for that purpose made by him, by any deed, or by his will: (1 St. C. 269 *et seq.*, 8th edit.; Will. R. P. 234 *et seq.*, 13th edit.)

Q.—If A., on the sale of his estate, covenant for quiet enjoyment against all persons claiming by, from, or under him, would a claim of dower by his mother come within the covenant?

A.—Under such a covenant as the foregoing, a claim of dower by A.'s mother would not come within it, for she does not claim "by, from, through, or under" A.: (see Sug. Conc. V. 461.)

Q.—By what means, in a conveyance of freeholds, would you bar the dower of the wife of a purchaser married before the 1st of Jan. 1834; and by what means would you bar it, if the purchaser married after that date?

A.—If married on or before the 1st Jan. 1834, the mode is to give the purchaser, first, a general power of appointment; and in default of, and until such appointment to him for life, and after the determination of his life interest by any means in his lifetime, a remainder (vested) is limited

to a trustee and his heirs during the purchaser's life, but nevertheless upon trust for him, followed by an ultimate remainder to the heirs and assigns of the purchaser for ever. Here dower cannot attach, for the purchaser has not at any time during his life an estate of inheritance *in possession*: (see Will. R. P., 306, 13th edit.)

If the purchaser was married after the 31st Jan. 1834, all that is necessary is to insert in the purchase deed a declaration that the purchaser's widow shall not be dowable out of the lands: (3 & 4 Will. 4, c. 105, s. 6.)

Q.—What was the form of conveyance of freeholds of inheritance, to prevent the attachment of the purchaser's wife's dower before the statute of William the Fourth? Is it now ever necessary, and in what case?

A.—The form we have set out in the preceding answer. And this form must still be used if the purchaser was married on or prior to the 1st Jan. 1834; as the statute of William the Fourth only applies to purchasers married after that date.

Q.—What is the difference between jointure and dower? and how is the former constituted, and how does the latter arise?

A.—Jointure is an estate for the life of the wife, to take effect in possession or profit immediately after her husband's death, and arises by the express contract of the parties, and is in lieu of dower. Dower (as before fully shown) is an estate for the life of the wife in a third part of the husband's lands and tenements of inheritance, and arises by operation of law: (see Will. R. P. 234, 237, 13th edit.)

Q.—When must jointure be effectual to bar dower? Can a widow be entitled to both, and, if so, in what case?

A.—To make the jointure an effectual bar of dower: 1. It must be made to take effect immediately after the death of the husband. 2. It must be for her own life at least, and not *pur autre vie*, or for a term of years or other smaller estate. 3. It must be made to herself and no other in trust for her. 4. It must be made in satisfaction of her whole dower, and not of any particular part of it. 5. It must be made *before* marriage, or she may, upon her husband's death, elect whether she will take it or her dower, for she was not capable of consenting to it during coverture. She cannot claim both: (see Tud. L. O. O. 55 *et seq.*, 2nd edit.)

Q.—What is the effect of a jointure upon dower, when the instrument creating the jointure does not contain the common stipulation that the jointure is to be in lieu of dower?

A.—It will still bar the widow's right to dower in equity on the implied intention of the parties: (see Sug. R. P. Stats. 256, 257.)

Q.—Is the widow of a tenant in tail who died without issue entitled to dower? Would the widow's right, if any, be affected, and how, if her deceased husband had been tenant in tail after possibility of issue extinct?

A.—The widow of a tenant in tail will be entitled to dower, although he died without issue. It is not necessary that issue should be *actually born* to entitle the wife to dower; it is sufficient if the wife might have

had issue who might have inherited. If the husband was only tenant in tail after possibility of issue extinct, issue could not possibly have been born, therefore his widow will not be entitled to dower: (Will. R. P. 55, 234, 13th edit; 1 St. C. 267, 8th edit.)

*Q.*—What is freebench, and how does it arise?

*A.*—Freebench is that estate in copyhold lands that a wife has after the death of her husband for her dower, according to the custom of the manor. It also arises by custom. The widow's dower in gavelkind lands is also termed freebench, it also extends to one half, and is lost by remarriage or becoming unchaste: (see Will. R. P. 371, 385, 13th edit.)

*Q.*—What is the distinction between freebench and dower, and how far have the differences between them been altered by the Dower Act?

*A.*—The distinction between freebench and dower at common law is, that freebench is a widow's estate in such copyhold lands as her husband died seised of, whereas dower at common law is the estate of the widow in all freehold lands of inheritance of which the husband was seised at any time during the coverture. By the Dower Act (3 & 4 Will. 4, c. 105), a widow's right to dower, if married after the 1st of January, 1834, only extends to property to which the husband died seised, possessed, or entitled, and may be barred by a declaration in the husband's will or in a deed. Freebench does not extend to equitable estate: (see Holth. L. D. 2nd edit.)

*Q.*—*A.*, having married after the Dower Act (3 & 4 Will. 4, c. 105), purchased, and was duly admitted to, copyhold lands, and by a deed executed by him declared that his widow should not be entitled to dower out of such copyhold lands. Will the widow be barred of her customary dower out of such copyhold lands by such deed?

*A.*—Not by this declaration, as the Dower Act does not affect copyholds. However, freebench is generally subject to the husband's power of disposition: (see *Smith v. Adams*, 18 Beav. 499; Sug. R. P. Stats. 259.)

*Q.*—What is a tenancy by the curtesy of England?

*A.*—It is one to which a man is by law entitled for life on the death of his wife in the lands and tenements of which she was seised during the marriage in fee simple or fee tail; provided he had issue by her born alive during the marriage, and capable of inheriting her estate; it extends to separate use property: (1 St. C. 262, 8th edit.; Will. R. P. 229, 13th edit.)

*Q.*—What are the requisites to establish the husband's right as tenant by the curtesy of England?

*A.*—There are four. 1. Marriage, which must be legal. 2. Seisin of the wife, or of her trustee, which must be an actual one, not a bare right to possess, but a seisin in deed. 3. Issue born alive, during the life of the wife, and capable of inheriting as heir to the wife. 4. Death of the wife in the lifetime of the husband: (1 St. C. 263, 8th edit.; Will. R. P. 229, 13th edit.)

*Q.*—Is there any and what exception as to such tenancy with respect to any and what lands in any particular county in England?

A.—By the custom of gavelkind (which chiefly prevails in the county of Kent) the husband has a right to his curtesy whether he has had issue or not; but the curtesy in gavelkind lands extends only to a moiety, and ceases if the husband marries again: (Will. *ubi sup.*; 1 St. C. *ubi sup.*)

Q.—To entitle a husband to curtesy, is it necessary that the issue should be next heirs of the wife?

A.—Yes. Thus, if the wife is seised of lands in tail male, the birth of a daughter only will not entitle the husband to be tenant by the curtesy; for the daughter cannot inherit such estate as heir to her mother: (see Will. R. P. 229, 13th edit.) (a)

Q.—How may dower and curtesy respectively be barred?

A.—If the marriage took place before the 3 & 4 Will. 4, c. 105, came into operation, dower may be barred or rather prevented from attaching by taking a conveyance of the land to dower uses. If after this Act by a simple declaration (see *ante*); and whether the widow was married before or since this Act, her dower may be barred by accepting a jointure before marriage; or by her detaining the title deeds, by the wife's adultery, and by a dissolution of the marriage. So it may be released under the 3 & 4 Will. 4, c. 74. Curtesy will not attach if any of the requisites above detailed are wanting, and it is barred by a divorce: (1 St. C. 270, &c., 8th edit.)

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## LEASES.

*Question.*—What is a lease, and state the general particulars belonging to it?

*Answer.*—It is properly a conveyance of any lands or tenements (usually in consideration of rent or other annual recompense) made for life, for years, or at will, but always for a less time than the lessor has in the premises; for if it be for the whole interest, it is more probably an assignment of a lease. A lease for years must have a certain beginning and end in point of time, but it may commence *in futuro*: (1 St. C. 510, 8th edit.; Arch. L. & T. 2, 2nd edit.)

Q.—For what length of time is a tenancy, by parol, binding without a written agreement?

A.—The term must not exceed three years from the making thereof, and the rent reserved must amount at least to two-thirds of the full improved value of the land. If the lease is for a longer period, or at a lower rent, it must be by deed: (29 Car. 2, c. 3; 8 & 9 Vict. c. 106; Will. R. P. 393, 13th edit.)

Q.—Can a parol lease be granted for any period of the right of sporting over an estate?

A.—No; for such a right is an incorporeal hereditament, and must be

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(a) Where the wife's real estate did not fall into possession till after the husband's bankruptcy and discharge, it was held, that though there has been issue of the marriage, the husband had not at the time of his bankruptcy any such interest as tenant by curtesy as would pass to his assignees: (*Gibbons v. Eyden*, L. Rep. 7 Eq. Cas. 871.)

granted by deed: (*Bird v. Higginson*, 2 A. & E. 696; Arch. L. & T. 2, 2nd edit.)

Q.—What estate passes by signing and sealing an agreement for a lease?

A.—If it appears from the express words of the agreement, or from the indefiniteness of some of its stipulations, to have been the intention of the parties that the lessee should not take possession of the land until the execution of a more formal instrument, no legal estate is created until that is effected, although the agreement is sealed as well as signed: (see Arch. L. & T. 60, 2nd edit.)

Q.—What is the position of a tenant who has entered and paid rent for corporate property under an instrument purporting to be a demise for a term of years made on behalf of the corporation but not sealed with their common seal?

A.—He holds as a tenant from year to year, and upon such terms of the void lease as are applicable: (see *Wood v. Tate*, 2 B. & P. N. R. 247; Pollock on Contracts, 2nd edit. p. 138.)

Q.—A., in writing, agrees to let land to B. for a term of years at a certain rent; B. enters into possession, and pays the rent to A.; what is B.'s tenancy, and what right has he against A.?

A.—If B. pays rent half-yearly or quarterly, he will be considered as a tenant from year to year: (see *Richardson v. Langridge*, L. C. Conv. 4; 1 St. C. 287, 8th edit.) And B. may, by writ in the Chancery Division, compel A. to grant the lease as agreed: (Lord St. Leonards' Handy Book, Letters 7, 15.)

Q.—A. demised Broke Farm by parol to B. for six years from Michaelmas, 1860, at a rent of 200*l.* per annum, the tenant to have 10*l.* per annum allowed him towards drainage, and also wood for repairs. What terms of the tenancy (if any) were binding and what void?

A.—At law the agreement was void for not being in writing as required by the Statute of Frauds, and by deed as required by 8 & 9 Vict. c. 106; but after a payment of rent under it B. became yearly tenant upon the terms of such contract so far as they are applicable to a yearly tenant: (*Woodfall*, L. & T. 143, 8th edit.) But it should be observed that when once admission was taken under the contract, equity would have enforced the performance of it as an agreement for a lease: (*Parker v. Taswell*, 27 L. J. 812, Ch.)

Q.—What is an *interesse termini*, and is it assignable?

A.—An *interesse termini* is that species of property or interest which a lessee for years acquired in the lands demised to him before he has actually become possessed of them by entry. It may be granted over to another, or may be extinguished by release: (Burt. Comp. pl. 61, 907; Will. R. P. 396, 13th edit.)

Q.—What is a tenancy for a term of years; and what is the lessee when he enters by force of the lease?

A.—Until entry it is no *estate*, only an *interesse termini*. But after entry the tenant has an *estate*, and is complete tenant for years. How-

ever, if the lease should be made by conveyance operating by virtue of the Statute of Uses, the lessee will have the whole term at once vested in him, in the same manner as if he had actually entered: (Will. R. P. 396, 13th edit.; Burt. Comp. pl. 58-61.)

Q.—Describe the title given by a lease for a term of years to commence at next Christmas.

A.—It is an *interesse termini*: (Will. R. P. 396, 13th edit.; Holth. L. D., 2nd edit.)

Q.—What, if any, difference is there supposing the term to have been created by way of use by a tenant in fee?

A.—Here the tenant's estate will vest in him at Christmas without entry: (Will. R. P. 396, 13th edit.)

Q.—(1) A. lets premises to B., reserving a compensation not referable to a year or the aliquot part of a year. (2) A. lets premises to B., at so much a year, payable quarterly. Nothing is said in either case as to terms. What tenancies are respectively created?

A.—In the first case it is merely a tenancy at will that is created; but the law leans against these tenancies, and so soon as rent is paid which can be measured by an aliquot part of a year, construes them as tenancies from year to year. The second agreement creates a tenancy from year to year: (*Richardson v. Langridge*, L. C. Conv. 4, and notes.)

Q.—What estate must a person have to enable him to make a lease by which the lessee may derive a present tenancy and occupation?

A.—He must have an estate in possession.

Q.—If a remainderman, not in possession, makes a lease, what estate or interest would the lessee derive under it?

A.—The lessee will have a future *interesse termini*. The remainderman will be bound by estoppel, and when his estate comes into possession the lease will take effect for the remainder of the term: (see Will. R. P. 396, 13th edit.; Arch. L. & T. 61, 2nd edit.)

Q.—If joint tenants make a demise, what tenancy has the lessee, and what tenancy has he if the demise is by tenants in common?

A.—Joint tenants have but one freehold; and therefore, in leases granted by them, the demise by, reservations to, and covenants with them, are made precisely in the same manner as when the lease is granted by a sole owner, the plural number being substituted for the singular. But tenants in common have several freeholds; consequently a lease granted by them operates as a separate demise of each share: (4 Jarm. Conv. by Sweet. 236.) And it seems joint tenants may sever in making leases: (see Arch. L. & T. 11, 2nd edit.)

Q.—A., tenant for life of an estate let to B. from year to year, at a rent payable half-yearly at Lady-day and Michaelmas, dies at Christmas. C., the reversioner, receives the half-year's rent due at the next Lady-day. Will this create any, and what, tenancy between C. and B., and when will the same determine?

A.—Supposing the 40 & 41 Vict. c. 18, s. 46, and the 45 & 46 Vict. c. 38, s. 6, do not apply, the lease of the tenant for life ends with his



death, unless made under a power, so that the remainderman cannot by his own act confirm it. But in such a case acceptance of rent, as rent, by the remainderman will be evidence of a new tenancy from year to year, so as to render a notice to quit necessary: (Arch. L. & T. 10, 2nd edit.) However, it must be remembered that if the lease be of a farm at rack rent which determines by the death of the tenant for life, the tenant is to hold over until the end of his current year's tenancy, instead of taking emblements, and then quit without notice, and the remainderman is entitled to his proportion of the rent: (14 & 15 Vict. c. 25.)

*Q.*—What leases can infants make, and what tenancy has the lessee?

*A.*—Leases by infants are not void, but they are voidable on the infant's attaining his majority. Consequently, the infant may either confirm or avoid them on attaining his majority. Accepting rent *after* he is of full age is a confirmation of the lease: (Arch. L. & T. 3, 2nd edit.) The Infants' Relief Act 1874 (c. 62) in our opinion does not extend to leases.

*Q.*—What tenancy has a lessee from an idiot or lunatic? and to have a secure tenancy for the term, what course should be adopted; and by what means can idiots or lunatics surrender and renew leases?

*A.*—An idiot or lunatic cannot make any effectual disposition of his property. But the committee of the estate of such idiot or lunatic may, under the direction of the Lord Chancellor, grant leases, according to the lunatic's interest in the land, for such term as the Lord Chancellor shall direct. And may, by the like direction, surrender and renew leases: (16 & 17 Vict. c. 70; Arch. L. & T. 6, 2nd edit.; see also 40 & 41 Vict. c. 18, s. 49, and 45 & 46 Vict. c. 38, s. 62.)

*Q.*—Mortgagor and mortgagee: what separate right has each to lease the mortgaged premises; and what would be the lessee's tenancy holding a lease from the one without the concurrence of the other?

*A.*—A mortgagor cannot grant a lease of the mortgaged premises that will bind the mortgagee, nor will the mortgagee's leases be binding on the equity of redemption, unless each has a leasing power conferred upon him by the other. But such leases are good as between the parties to them and their representatives. The tenant, therefore, to have a secure tenancy should require both mortgagor and mortgagee to join in the lease (see Arch. L. & T. 12, 2nd edit.); but if the mortgage be executed after 31st Dec. 1881 either mortgagor or mortgagee in possession may lease for agricultural or occupation purposes not exceeding twenty-one years, and for building purposes not exceeding ninety-nine years, subject to the provisions of 44 & 45 Vict. c. 41, s. 18.

*Q.*—Where a lease is made by mortgagor and mortgagee of the mortgaged estate, to whom should the rent be reserved, and with whom should the covenants be entered into, and why?

*A.*—The rent should be reserved to the mortgagee, and the covenants also entered into with him, for he has the legal estate: (*Webb v. Russell*, 3 T. R. 393.) Some conveyancers, however, reserve the rent to the mortgagee until redemption, and then to the mortgagor (*Hughes' Conv.* 522), while others frame the *reddendum* generally "to the person



entitled for the time being" to the property: (Green, Conv. 63, 64, 3rd edit.)

Q.—When land mortgaged is held either by tenancy created before the mortgage or under a demise created by the mortgagor after the mortgage, what are the distinct remedies in each case for the mortgagees obtaining rent or possession?

A.—If the tenancy was created before the mortgage, the mortgagee may, after giving notice to the tenant, distrain for past rent as well as for rent accruing due after notice, he being assignee of the reversion: (*Moss v. Gallimore*, 1 Sm. L. C. 627; Arch. L. & T. 115, 2nd edit.)

If the mortgagor lease the premises after the mortgage, the mortgagee cannot, by giving notice, distrain or sue for the rent, unless the tenant attorns to him, and then only for rent becoming due after attornment. But he may, without notice, eject the tenant: (*Keech v. Hall*, 1 Sm. L. C. 574; and see 44 & 45 Vict. c. 41, s. 18, *ante*, p. 245.)

Q.—When land mortgaged is in the actual possession of the mortgagor, what, if any, means can be taken in the mortgage deed for giving to the mortgagee power to obtain the interest out of the rents and profits of the land?

A.—Either by inserting in the mortgage deed a clause of attornment by the mortgagor as tenant to the mortgagee, at a yearly rent, or by giving the mortgagee an express power to distrain for interest, which does not, however, create a tenancy: (Hughes' Conv. 344, 358.)

Q.—How can a tenancy from year to year be created, and how determined? Give a form of notice to a tenant from year to year whose tenancy commenced on one of the usual quarter-days; it is supposed Lady-day, but it is not certain.

A.—Such a tenancy may be created by a written or verbal agreement of the parties, or it is implied by law, as where the tenant is let into possession without mention of any time, and pays rent half-yearly or quarterly: (*Richardson v. Langridge*, L. C. Conv. 4.)

This tenancy can only be determined by giving six calendar months' notice to quit, to expire at the end of the current year's tenancy: (Arch. L. & T. 91, 2nd edit.) The form of notice will run thus:

"I hereby give you notice to quit and deliver up possession of the —, situate at —, which you now hold of me as tenant, on the 25th March next, or at the expiration of the current year of your tenancy which shall expire next after the end of one half year from the date of this notice. Dated the 29th Sept. 1878."

But agricultural tenancies, under 38 & 39 Vict. c. 92, and 46 & 47 Vict. c. 61, now require a year's notice, unless otherwise agreed.

Q.—Is there any, and if any what, distinction between a tenancy at will and a tenancy from year to year?

A.—Yes; for either party, landlord or tenant, may determine a tenancy at will at his own pleasure: (Co. Lit. 55.) But as to a tenancy from year to year, both landlord and tenant are entitled to notice as above stated before the tenancy can be determined by either of them: (Will. R. P. 390, 13th edit.)

Q.—Where a tenancy is for a term of years certain, is any, and what, notice to quit necessary?

A.—When a lease is determinable on a certain event, or at a particular period, no notice to quit is requisite, as both parties are equally apprised of the determination of the term: (*Right v. Darby*, 1 T. T. 162; Arch. L. & T. 220, 2nd edit.)

Q.—Give the outline of an ordinary lease for twenty-one years of a private dwelling-house in London.

A.—Date; parties; recitals, if any; demise of the premises; habendum; and reddendum, clear of all rates and taxes. Covenants by lessee as stated *infra*, and also to insure, not to assign or underlet without licence, or carry on any trade; covenant by lessor as stated *infra*. Power for either party to determine lease at the end of a given number of (generally seven or fourteen) years. A schedule of fixtures is generally appended: (see Arch. L. & T. 44, 2nd edit.)

Q.—What covenants are included by the expression “usual covenants” in a contract for the lease of a private house in London?

A.—The “usual covenants” on the part of the tenant are—(1) to pay rent and taxes (except land tax and property tax); (2) to keep and leave the demised premises in repair; (3) to yield up possession at the end of the term; (4) to allow the lessor to enter to view the state of repair, and to enter on breach of any covenant or condition; (5) the lessor covenants for quiet enjoyment: (Hughes’ Conv. 525; 2 Prid. Conv. 16, 9th edit.)

Q.—A. grants an original lease to B. for twenty-one years, with usual covenants, and with a covenant at the end of eighteen years to grant a new lease, with all covenants, grants, and articles contained in the original lease. Of what covenants will B. have a right to demand the insertion in the new lease?

A.—Such covenants as the original lease contained, omitting that as to renewal; for covenants for renewal are construed more in favour of lessor than lessee: (Hughes’ Conv. 498.)

Q.—Does a lessor usually enter into any covenant in a lease, and if so, why? State the effect of the word “demise” in a lease.

A.—The lessor usually covenants for quiet enjoyment, it being to the advantage of both parties. For otherwise, if the word *demise* be used in the lease, the law (in the absence of express covenant) implies such a covenant, which applies not only to the acts of the lessor, but to those of every person having lawful title. On the other hand, it subsists only during the lessor’s life and no action thereon lies against his executors for ouster after his death: (Arch. L. & T. 271, 272, 2nd edit.)

Q.—Show the outline of an ordinary farming lease for seven years.

A.—Date; parties; demise; habendum; reddendum; reservations of timber, underwood, rights of entry, way, sporting, &c. Covenants by the tenant as stated in next answer; also covenants against converting pasture into tillage, or sowing or planting flax, &c., under penalty of an additional rent; and to pay stated damages for waste, &c. Powers of re-entry for the landlord on non-payment of rent or breach of covenant. Covenant by lessor for quiet enjoyment: (see Arch. L. & T. 65, 2nd edit.)

Q.—What covenants are included in a contract for a farming lease by the expression “usual covenants?”

**A.**—The usual covenants in a farming lease depend very often on the custom of the country. But they are usually (1) to pay rent and taxes; (2) to repair; (3) to cultivate in a husbandlike manner or according to the custom of the country; (4) not to injure trees or saplings; (5) nor to cut hedges except at due seasons; (6) not to sow lands more than once a year, and (7) to stack all the corn and hay, and use all the manure on the premises; (8) covenant by lessor for quiet enjoyment: (Hughes' Conv. 530.)

**Q.**—State the principal covenants on the part of the lessee which should be contained in a building lease of land in a town, to be granted by a freeholder.

**A.**—Covenants to pay rent and taxes; to build (according to the agreement), to repair, to paint, to insure in joint names of lessor and lessee, and to surrender at the end of term. The lease should also contain powers of entry for the lessor to view the premises, and give notice of repairs, and powers of re-entry on non-payment of rent, or non-performance of covenants. These are the principal and usual covenants, but special covenants are often necessary, as to construct sewers and roads, or to bear a portion of the expense thereof.

**Q.**—A lease contains a covenant by the tenant to pay all taxes, whether chargeable by law on landlord or tenant. What effect will the covenant have, as between the lessor and lessee, upon the liability for payment of land tax and property tax respectively?

**A.**—Notwithstanding such a covenant, the tenant, if he has paid the property tax, may deduct it from his next payment of rent, and the landlord refusing to allow the deduction is subjected to a penalty of 50*l.* (5 & 6 Vict. c. 35, s. 103). The covenant would, however, bar the lessee from claiming a deduction on account of the land tax: (*Amfield v. White, Ry. & Moo.* 246.)

**Q.**—What is the best form of a reddendum in a lease?

**A.**—The best form seems to be to reserve the rent generally during the term, without reserving it to anyone in particular, in which case it will accrue to the persons, whoever they may be, who are entitled to the immediate reversion expectant thereon: (Hughes' Conv. 521, 522.)

**Q.**—State the general outline of a lease of a house, as to such covenants and conditions as would be proper between landlord and tenant in respect of repairs, and payment of rent in case of premises being destroyed by fire.

**A.**—There should be an exception in the reddendum that no rent shall be payable whilst the premises are uninhabitable by reason of fire; the land tax should also be excepted out of the rates and taxes payable by the tenant; and the covenant of the tenant to paint and repair should also contain an exception in case of fire.

**Q.**—Why do we insert in a lease two distinct clauses for payment of rent, the reservation or "yielding and paying" clause, and the covenant to pay? State the several functions of these two clauses.

**A.**—We insert the two clauses because, although the words "yielding and paying" imply a covenant to pay rent, and give an action of debt and a power to distrain, yet this implied covenant does not bind the lessee

after he has assigned the lease with the lessor's assent, express or implied ; whereas on the express covenant the lessor can bring debt or covenant, and the lessee usually binds his heirs thereby, and still continues liable after assignments, even though it was with the lessor's consent. The functions of the reddendum, besides those mentioned, are to point out the times and places of payment of the rent ; those of the covenant for the purposes above stated : (Arch. L. & T. 33, 37, 113, &c., 2nd edit.)

Q.—The custom of the profession has settled, in cases of deeds in which more than one person is interested, by the solicitor of which party they are to be prepared. What is the leading principle on which such custom is founded, and what striking exception to it is there in practice ?

A.—The solicitor for the purchaser prepares the deed, the principle being that the party who takes the benefit of the deed should prepare it in the form he considers most desirable. The exception is in cases of leases, which are prepared by the lessor's solicitor.

Q.—What is waste by a lessee of a house and of a meadow ; what is the effect on the lessee's title if he commits waste ; and what is the effect of the reservation in the lease of a meadow of an additional rent of 20l. per acre, if the grass is broken up and converted into tillage ?

A.—Waste of a house is either voluntary, as where the tenant pulls down the house ; or permissive, as by suffering it to remain out of repair. Converting meadow into arable land is voluntary waste. If the tenant commits voluntary waste, he can be restrained by injunction, and is liable to an action for damages. A tenant for years formerly was not liable on an action during the term for *permissive* waste, even if he had covenanted to repair. (a) However, the lease usually gives the lessor a power of re-entry in case of waste. If an additional rent be reserved as stated, it may be recovered either by distress or action : (Arch. L. & T. 113, 200, 204, 2nd edit.)

Q.—What is the difference of obligation, where the law creates a duty and where it is created by a man's own contract ? Illustrate your answer by pointing out what is the liability of a tenant under a lease to pay rent, after the premises have been accidentally burnt.

A.—The rule is, that when *the law* creates a duty, and the party is disabled to perform it, without any default in him, and he has no remedy over, the law will excuse him ; but when the party *by his own contract* creates a duty or charge upon himself he is bound to make good his contract, notwithstanding any accident by inevitable necessity, because he might have provided against it in his contract. Hence, where a lessee covenants generally to pay rent he is bound to pay it, though the house be burnt down : (Woodfall's Landlord and Tenant, 8th edit., p. 354.)

Q.—Is a lessee, under the usual covenants to repair and to pay rent, liable to pay rent whilst the buildings are uninhabitable by reason of fire until they are rebuilt, and is there any, and what, exception or relief to such liability ?

A.—If a lessee covenants to pay rent during the term, without any

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(a) But where a tenant for *life* had expressly covenanted to repair, the Court of Equity would decree an account : (*Marsh v. Wells*, 2 S. & S. 87.)

proper exceptions, it must be paid, notwithstanding that the premises are accidentally burnt down during the term, and equity will not grant him any relief: (St. Eq. § 102.) (a)

Q.—Is a lease forfeited if the covenant to insure be broken one year, though the insurance be effected in subsequent years?

A.—Yes, and equity would not formerly relieve against such a forfeiture; but by the 22 & 23 Vict. c. 35, and the 23 & 24 Vict. c. 126, both courts of law and equity could relieve against such a forfeiture under certain conditions, and now these provisions are repealed and relief will be obtained by sect. 14 of 44 & 45 Vict. c. 41, which provides that a right of re-entry or forfeiture for breach of any covenant or condition in a lease shall not be enforceable unless the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy requiring the lessee to remedy it, and in any case requiring the lessee to make compensation in money for the breach and the lessee fails to do so; and where the lessor proceeds the court may grant relief on such terms as it thinks fit.

Q.—If, in a lease, the lessee covenant to keep the premises in repair, except damage by fire, or some particular repairs, can he compel the lessor to do the excepted repairs without an express covenant on his part for the purpose?

A.—The lessee cannot compel the lessor to do the excepted repairs without an express covenant for the purpose: (see Arch. L. & T. 279, 2nd edit.)

Q.—By what authority is it that the benefit of a condition for re-entry, which was originally confined to the lessor and his heirs, is extended to the assignees of the reversion, and what led to such an extension of this conditional right?

A.—Upon the dissolution of the monasteries by King Henry VIII. most of their estates were granted to private persons, who could not take advantage of the conditions contained in the leases which had been formerly made of them. This produced the stat. 32 Hen. 8, c. 34, reciting that divers persons had leased manors, &c., for life or years by writing containing certain conditions, covenants and agreements: and reciting that by common law no stranger to any condition or covenant could take advantage thereof, &c. It enacted that all grantees and assignees, and the heirs, executors, successors, and assigns of every of them, shall and may have the like advantage by entry for non-payment of rent, for doing waste, or other forfeiture, and the same remedy by action only for not performing other conditions, covenants, and agreements contained in the said leases, as the lessors and grantors might have had: (2 Cruise Dig. 34, 7th edit.; and see further 44 & 45 Vict. c. 41, s. 10.)

Q.—If a landlord has actually waived a breach of a covenant in a lease in one particular instance, will such breach be deemed a general waiver of the covenant?

A.—By 23 & 24 Vict. c. 38, s. 6, if since this Act, this will not be deemed a general waiver unless an intention to that effect shall appear.

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(a) The tenant, in addition to the premises, should insure a year's rent to protect himself.

**Q.**—A lease contains a condition for re-entry on the tenant assigning or underletting without licence. The landlord gives a licence to underlet only; what effect has this on the condition for re-entry according to the present law?

**A.**—This will not destroy the right of re-entry on any future breach as it formerly did: (22 & 23 Vict. c. 35, s. 1.)

**Q.**—A., holding Blackacre and Whiteacre of B. under a lease containing a power of re-entry on assigning without licence, assigns Blackacre with licence, and afterwards assigns Whiteacre without licence. Does the last-mentioned assignment operate as a forfeiture of Whiteacre, and what would have been the result thirty years ago?

**A.**—Before 1859 a licence to break a covenant, as to part only of the property contained in a lease, extended to the whole; and consequently the subsequent assignment of the other part was no forfeiture; but by the 22 & 23 Vict. c. 35, s. 2, it is provided that a licence with respect to part only of the property demised is not to destroy the right of re-entry as to the remainder of the property: (Langley's Trustee Acts, p. 6.)

**Q.**—What is the distinction between "privity of contract" and "privity of estate" as between lessor and lessee?

**A.**—Privity of contract is that relationship which exists between two or more contracting parties (Holt. L. D., 2nd edit.); whereas privity of estate is the relationship which exists between parties in respect of an estate passing from one to the other immediately or mediately: (*Ib.*) Thus there is both a privity of contract and estate between lessor and lessee; but between lessor and assignee there is only a privity of estate: (see *Spencer's case*, 1 Sm. L. C. and notes.)

**Q.**—What is meant when it is said that there is no privity of estate between a lessor and an under-lessee, and what does this involve?

**A.**—There is no privity of estate except between the contracting parties and their representatives, and an under-lessee has not the estate that the original lessee had, and consequently does not represent him. Covenants running with the land only bind the representatives of the contracting parties, consequently the under-lessee is under no liability to the original lessor.

**Q.**—Is the assignee of a lease to any and what extent liable to the original lessor under the covenants of the lessee?

**A.**—Yes; he is liable on all the covenants that run with the land while the term remains vested in him, for during that time he is tenant to the lessor, and a privity of estate exists between them. Thus he will be bound by a covenant to pay rent and taxes, or to keep the demised premises in repair: (see *Spencer's case*, *ubi sup.*; Will. R. P. 397, 13th edit.)

**Q.**—How does such liability of the assignee of the lessee differ from the liability of the lessee's executor?

**A.**—The assignee is liable to the lessor, so long as he remains assignee, on all covenants running with the land. But the lessee's executor is liable for the whole term, subject to 22 & 23 Vict. c. 35 (*infra*), on all the lessee's covenants in the lease to the extent of his assets.



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**A.**—There is no privity of estate except between the contracting parties and their representatives, and an under-lessee has not the estate that the original lessee had, and consequently does not represent him. Covenants running with the land only bind the representatives of the contracting parties, consequently the under-lessee is under no liability to the original lessor.

**Q.**—Is the assignee of a lease to any and what extent liable to the original lessor under the covenants of the lessee?

**A.**—Yes; he is liable on all the covenants that run with the land while the term remains vested in him, for during that time he is tenant to the lessor, and a privity of estate exists between them. Thus he will be bound by a covenant to pay rent and taxes, or to keep the demised premises in repair: (see *Spencer's case*, *ubi sup.*; Will. R. P. 397, 13th edit.)

**Q.**—How does such liability of the assignee of the lessee differ from the liability of the lessee's executor?

**A.**—The assignee is liable to the lessor, so long as he remains assignee, on all covenants running with the land. But the lessee's executor is liable for the whole term, subject to 22 & 23 Vict. c. 35 (*infra*), on all the lessee's covenants in the lease to the extent of his assets.

**Q.**—What difference is there between the liability of the lessee and the liability of the lessee's assignee in regard to breaches of contract?

**A.**—The lessee is liable on his express covenants during the whole continuance of the term, notwithstanding any assignment which he may make; but the assignee is only liable for such covenants as run with the land, which may be broken during the time that the term may be vested in him, and not after he has assigned it over to another person: (see Will. R. P. 397, 13th edit.; Arch. L. & T. 75, 2nd edit.)

**Q.**—A. takes a beneficial lease, and afterwards assigns it to a purchaser. Do A. and his executors remain liable to the rents and covenants? and if they do, how may they be most effectively protected against them?

**A.**—A., being lessee, is liable, notwithstanding the assignment; but he is entitled to an indemnity from the assignee against the rent and covenants. So his executor is liable as such to the extent of the assets, and formerly even after he had assigned the lease: (2 Sm. Comp. 804, 4th edit.)

The 22 & 23 Vict. c. 35, however, now protects an executor (liable as such on the covenants in a lease of his testator) from further liability, if he has satisfied all claims in respect thereof due up to the time when he assigns it over to a purchaser, and has also set apart a sufficient fund to answer any future claim that may be made in respect to any fixed sum covenanted by the lessee to be laid out on the demised property, although the time for laying it out has not then arrived, but the lessor may follow the assets: (sect. 27.) (a)

**Q.**—Is a sub-lessee to any and what extent liable to the original lessor under the covenants of the lessee in the original lease?

**A.**—He is not liable to the original lessor under the covenants of the lessee in the original lease; between the under-lessee and the original lessor no *privity* is said to exist; he is tenant to the lessee and not to the original lessor: (see Will. R. P. 408, 13th edit.)

**Q.**—In leases, what is the meaning of "proviso for re-entry," and "covenants running with the land?" How, in these points, are the assignees or lessor and lessee respectively affected? Is there any statute on the subject?

**A.**—A "proviso for re-entry" is a clause inserted in a deed of grant or demise, providing that the grantor or lessor may re-enter on a breach of a condition by the grantee or lessee.

A covenant is said to "run with the land" when either the liability to perform it or the right to take advantage of it passes to the assignee of the land. At common law no one but the grantor could re-enter for a forfeiture, and no grantee or assignee of the reversion could take the benefit of a condition for re-entry; but 32 Hen. 8, c. 34, gives the same powers to the grantees or assignees as the grantor had: (Woodfall's Landlord and Tenant, 8th edit., p. 277, and see further 44 & 45 Vict. c. 41,

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(a) For example, suppose A., the lessee, had covenanted to lay out 100*l.* in certain repairs at the end of a fixed number of years, which had not arrived at the time of his death. His executors now satisfy all claims due at the time they assign the lease to a purchaser, and set apart the 100*l.* They are then freed from further liability by this section.

s. 10, when the reversion is severed on leases made after 31st December, 1881.) The assignees of lessor and lessee may sue and be sued on covenants running with the land and on those only. 8 & 9 Vict. c. 106, s. 5, enacts that under an indenture executed after the 1st of October, 1845, the benefit of a condition or covenant respecting any tenements or hereditaments may be taken, although the taker thereof be not named in the same indenture.

**Q.**—For how long, and under what authority, may a tenant for life of settled land grant leases?

**A.**—By the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 6, a tenant for life may lease the settled land or any part thereof, or any easement, right, or privilege of any kind over or in relation to the same for any purpose whatever, whether involving waste or not, for any term not exceeding—

(i.) In case of a building lease, ninety-nine years;

(ii.) In case of a mining lease, sixty years;

(iii.) In case of any other lease, twenty-one years.

**Q.**—Under what conditions must such leases be made?

**A.**—(1) Every lease shall be by deed to take effect in possession not later than twelve months after date.

(2) It must reserve the best rent that can reasonably be obtained.

(3) It must contain a covenant by the lessee for payment of rent, and a condition of re-entry on non-payment within not exceeding thirty days.

(4) A counterpart must be executed by the lessee and delivered to the tenant for life, of which, however, the execution of the lease by the tenant for life will be sufficient evidence.

(5) A statement contained in a lease or in an indorsement thereon signed by the tenant for life respecting any matter of fact or of calculation under the Act in relation to the lease shall, in favour of the lessee and his representatives, be sufficient evidence of the matter stated: (*Ib.*, s. 7.)

**Q.**—What additional regulations affect building and mining leases?

**A.**—(1) Every building lease shall be made partly in consideration of the lessee having erected or agreeing to erect buildings, new or additional, or having improved or repaired the same or agreeing to do so, or having executed or agreeing to execute improvements authorised by this Act in connection with building purposes.

(2) A peppercorn rent or other rent less than that ultimately payable may be reserved for the first five years.

(3) When the land is contracted to be leased in lots the rent may be apportioned among the lots in any manner, save that—

(i.) Annual rent on any lease shall not be less than 10s.

(ii.) Total amount of rents on all the leases shall not be less than the total amount of the rents, which, in order that the leases may be in conformity with the Act, ought to be reserved in respect of the whole land.

(iii.) The rent reserved in any lease shall not exceed one-fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed:

(*Ib.*, s. 8.)

## (1) In a mining lease—

(i.) The rent may be made ascertainable or varied according to the acreage worked or the quantity of mineral obtained or disposed of.

(ii.) A fixed or minimum rent may be made payable with or without power for the lessee, in case the rent, according to acreage or quantity, in any specified period, does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent.

(2) The lease may be made partly in consideration of the lessee executing mining improvements authorised by the Act: (*Ib.*, s. 9.)

*Q.*—Explain the provisions of the Acts of 1849, 1850, for remedying defects in leases under powers. What provision is made for giving validity to leases invalid by reason of deviation from the terms of the power, and what provisions for the confirmation of such leases?

*A.*—The Act of 1849 (12 & 13 Vict. c. 26) provides that where under a power a *bond fide* lease is granted, which, by reason of *any* deviation from the terms of the power, is invalid against those in remainder or reversion, and the lessee *has entered* thereunder, such lease is to be considered in equity as a *contract* for a valid lease under the power, except so far as any variation may be necessary in order to comply with the terms of the power. But if the remainderman or reversioner is able and willing to confirm the invalid lease without variation, the lessee is bound to accept such confirmation. By the Act of 1850, the mere acceptance of rent is not to be deemed a confirmation, as was provided by the Act of 1849, some memorandum of confirmation being requisite for this purpose: (see Will. R. P. 307, 308, 13th edit.) (*a*)

*Q.*—If A., tenant in fee simple, makes a lease of lands to B., to have and to hold to B. for term of life, without mentioning for whose life it shall be, what shall it be deemed, and why?

*A.*—It will be deemed an estate for the life of B., for an estate for a man's own life is more beneficial and of a higher nature than for another's life; and the rule of law is, that all grants are to be taken most strongly against the grantor: (Co. Lit. 42 a.)

*Q.*—State generally the form of the habendum of a lease for lives.

*A.*—It is this: To have and to hold the said ——— and all and singular, &c., unto the said (*lessee*) his heirs and assigns, from the date hereof, during the natural lives of the said (*cestuis que vie*), and the natural lives and life of the survivors and survivor of them: (see Jarm. Conv. by Sweet, 565.)

*Q.*—If A., seised of land in fee, demise it to B. for life, rendering for the same to A. his heirs and assigns an annual rent (without further powers or covenant in the demise), what remedies would A. and his heirs have for recovery of the rent?

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(*a*) As to the mode in which powers by deed are to be executed, see 22 & 23 Vict. c. 35, s. 12; and as to the power of a tenant for life to grant a lease, see 45 & 46 Vict. c. 38, s. 5.

A.—A right of distress, or of an action (formerly of debt): (Arch. L. & T. 105, 111, 152, 155, 2nd edit.)

Q.—Can a tenancy from year to year, created by parol, be surrendered by parol?

A.—It has been held upon the construction of the 29 Car. 2, c. 3, s. 3, that it extends to tenancies from year to year, and that a surrender of these estates must be in writing, unless, indeed, it be a surrender by operation of law.

Q.—Does the surrender of an original lease affect an under-lease? and give a reason for your answer.

A.—In order to the effectual surrender of an original lease, it was formerly necessary that any under-lease thereout granted should be also rendered up; for, unless this were done, the under-lease would have continued to exist, without liability to pay rent to anyone. However, by the 4 Geo. 2, c. 28, s. 6, if a lease is surrendered in order to be *renewed*, and a new lease granted, the owner of the new lease has the same right to and remedy for the rent of under-tenants as if the original lease had been kept on foot (see Will. R. P. 251, 13th edit.); and by the 8 & 9 Vict. c. 106, s. 9, in other cases the owner of the next estate in reversion in which the original lease has merged has the like remedy.

Q.—A. grants a lease to B. of certain hereditaments for lives. B. grants under-leases of those hereditaments, and afterwards is desirous to have a further or renewed lease of the premises from A. How is that to be effected?

A.—It is, as above shown, no longer necessary to surrender the under-leases in order to the effectual surrender and *renewal* of the original lease. B. may therefore surrender his interest to A. and take a renewal, which will give him full rights against the under-tenants.

Q.—What constitutes a surrender of a lease by “act and operation of law?”

A.—The acceptance by the tenant of a new lease operates as a “surrender in law” of the unexpired residue of the old term, for the tenant, by accepting the new lease, affirms that the lessor has power to grant it: Wms. R. P. 409, 13th edit.)

Q.—Under what circumstances can a term of years subsisting in land be enlarged into a fee simple?

A.—When there is a residue unexpired not less than 200 years of a term, which, as originally created, was for not less than 300 years without any trust or right of redemption affecting the term in favour of the freeholder or other reversioner, and without any rent having money value incident to the reversion, the term may be enlarged into a fee simple by (i.) any person beneficially entitled in right of the term to possession of any land comprised in the term; (ii.) a trustee of the term; (iii.) the personal representative of the termor, on the execution of a deed declaring to that effect. The fee will be subject to the same trusts, rights, and equities as the term: (44 & 45 Vict. c. 41, s. 65.)

By sect. 11 of 45 & 46 Vict. c. 39, every such term as above mentioned is to be included, whether having as the immediate reversion thereon the

freehold or not; but not (i.) any term liable to be determined by re-entry for condition broken, or (ii.) any term created by sub-demise out of a superior term itself incapable of being enlarged into a fee simple.

*Q.*—What alteration has recently been made in the law as to the apportionment of rents and periodical payments; and what cases are exempt from the operation of the Act?

*A.*—By the Apportionment Act, 1870 (33 & 34 Vict. c. 35), rents, annuities, dividends, and other periodical payments in the nature of income, shall be considered as accruing from day to day, and shall be apportionable accordingly: (sect. 2.) The Act does not apply to annual sums made payable in policies of assurance, nor in cases where it is stipulated that no apportionment shall take place: (sects. 6 and 7.)

*Q.*—If a person seised in fee makes a lease, reserving rent payable half-yearly, and dies in the middle of a half-year, who is entitled to the half-year's rent when due?

*A.*—The rent would be now apportioned between the real and personal representatives under the 33 & 34 Vict. c. 35: (*supra.*)

*Q.*—Tenant for life grants leases under a power, and dies in the middle of a half-year. Are the rents apportionable at his death?

*A.*—Yes, unless the contrary is declared: (see *supra.*)

*Q.*—If a tenancy continue after the expiration of a lease, without any new agreement, on what terms does the tenant hold?

*A.*—He is a tenant at sufferance only until rent is paid: (Will. R. P. 391, 13th edit.)

*Q.*—What are the remedies of landlords for the recovery of possession from tenants at sufferance?

*A.*—If the tenant holds under a lease or agreement in writing which has expired, or been determined by notice to quit, and refuses to deliver up possession after demand in writing made, the landlord may bring an action (formerly ejectment) for the recovery of possession in the High Court (see 15 & 16 Vict. c. 76, s. 213); or, if the annual value or rent does not exceed 50*l.* per annum, in the County Courts (see *ante*, p. 168); or if it does not exceed 20*l.*, may obtain a warrant for delivery of possession from justices of the peace: (Stone's Justice, 194.)

*Q.*—Where a lessor brings an action to recover possession for non-payment of rent reserved by lease, for want of sufficient distress on the premises, and obtains judgment and possession under an execution, can the lessee obtain relief?

*A.*—The tenant may now obtain relief if he apply within six calendar months next after the execution of the judgment, and on payment of all arrears of rent and full costs: (see 15 & 16 Vict. c. 76, s. 210; 23 & 24 Vict. c. 126. s. 1.)

*Q.*—What are the main features of the Ground Game Act, 1880, as between landlord and tenant?

*A.*—The occupier is entitled to kill ground game (hares and rabbits) concurrently with any other person having such right, and as inseparable from his occupation, and he is not able to divest himself of such right. He



may also authorise one other person in writing of the classes named. But an occupation for the purpose of grazing or pasturage for not more than nine months, will be insufficient to give these rights, and in the case of moorlands and uninclosed lands, the rights are only to be exercised from the 11th December to 31st March, except such moorlands, &c., are detached and adjoin arable lands, and are less than twenty-five acres in extent: (43 & 44 Vict. c. 47.)

**Q.**—Explain the nature and effect of attornment.

**A.**—Attornment is properly the acknowledgment by the tenant of a new lord: (Holth. L. D. 2nd edit.) By the 4 & 5 Anne, c. 16, attornments were made no longer necessary to complete a conveyance of the reversion; and by the 11 Geo. 2, c. 19, the attornment of any tenant does not affect the possession of any lands, unless made with consent of the landlord, or to a mortgagee after the mortgage is forfeited, or by direction of a court of justice: (see 1 St. O. 465, 509, 8th edit.)

## MORTGAGES.

**Question.**—What is a mortgage?

**Answer.**—It is a conveyance of lands by a debtor to his creditor as a pledge or security for the repayment of a sum of money borrowed. The debtor who so conveys his lands, or puts them in pledge, is termed the *mortgagor*, and the creditor to whom they are conveyed or pledged is termed the *mortgagee*. Mortgages are of two kinds, *vivum vadium*, or living pledge, and *mortuum vadium*, or dead pledge or mortgage: (see Holth. L. D. 2nd edit.; 1 St. O. 300, 8th edit.)

**Q.**—What is the difference between the *vivum vadium*, or living pledge or mortgage, and the *mortuum vadium*, or dead pledge or mortgage?

**A.**—The former is when a man borrows a sum of money of another (suppose 200*l.*) and grants him an estate as of 20*l. per annum* to hold till the rents and profits shall repay the sum borrowed; in this case the pledge survives the debt, and immediately on the discharge of that reverts to the borrower: (Holth. L. D. 2nd edit.)

The *mortuum vadium*, or dead pledge, is where lands are conveyed by one to another as a security for money lent, either in fee or for a term, with a condition that if the money be repaid on a certain day, with interest, the lands shall be reconveyed to the borrower: (Coote Mort. 4 *et seq.*, 3rd edit.)

**Q.**—What are the proper modes of mortgaging freehold, copyhold, and leasehold estates? State each severally.

**A.**—Freeholds, if not registered, under the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), are either mortgaged in fee or for a long term of years, usually the former; the deed containing all the usual limitations, covenants, powers, and provisoes: (see *post.*) (a)

(a) If, however, the lands have been registered under the above Act, they are mortgaged, or charged in the form given in the Schedule to the Rules and Orders under the Act: (see Form 20.)



A mortgage of copyholds is effected by conditional surrender, as detailed *ante*, p. 224.

Leaseholds, if not registered under the above Act, are mortgaged either by assignment or under-lease, usually the latter, as by this means the mortgagee is not rendered liable to the landlord for payment of rent and performance of the covenants of the lease: (Coote Mort. 108, &c., 3rd edit.) As to equitable mortgages, see *infra*.

Q.—Explain what is meant by the term “equitable mortgage.”

A.—An equitable mortgage means that a debtor has in equity created a charge on his estate in favour of his creditor, without having clothed such creditor with the legal estate. In fact, such a mortgage as would formerly be enforced in a court of equity only and not at law.

Q.—What is required to constitute an equitable mortgage?

A.—An equitable mortgage of non-registered land may be created by a deposit of the title deeds relating thereto with a creditor, as a security for an antecedent debt or on a fresh loan of money (*Russell v. Russell*, 1 L. C. Eq. 541, 2nd edit.) (a); or by an agreement or direction in writing showing the debtor's intention to make his land or property a security for the debt: (Sm. Man. sect. 595.)

Q.—Will a deposit of deeds, without writing, create a security? If so, may the object of the deposit be explained by parol evidence?

A.—As above stated, a deposit of deeds relating to non-registered land without writing creates an equitable mortgage; and the intention of the deposit may be explained by parol evidence: (St. Eq. § 1020.)

Q.—Would such a deposit have preference over a subsequent purchaser or mortgagee of the legal estate with or without notice of such equitable mortgage? Is a written memorandum essential or advantageous?

A.—Such a deposit would have preference over a subsequent purchaser or mortgagee having the legal estate, if he had at the time of his purchase or mortgage notice of the deposit. But if such purchaser or mortgagee *bond fide*, and for value, obtains the legal estate without notice, and registers his conveyance, (b) he will take priority over the equitable mortgagee: (St. Eq. §§ 64, 108, 396, 436, 1020.) As before stated, no memorandum is essential, but it is advantageous, as it facilitates proof.

Q.—Draw a memorandum of equitable mortgage, to be accompanied by a deposit of title deeds, in such form as not to be chargeable with stamp duty.

A.—Be it remembered that on this 10th day of August, 1881, the title deeds specified in the Schedule hereto, which relate to certain lands containing twenty acres or thereabouts situate at \_\_\_\_\_ in the county of \_\_\_\_\_, and belonging to \_\_\_\_\_, of &c., have been deposited by him with \_\_\_\_\_, of &c., by way of equitable mortgage of the same

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(a) But no equitable mortgage or lien on land registered under the 25 & 26 Vict. c. 53, can now be created by a deposit of title deeds; although the deposit of the land certificate of the depositor will create such a mortgage: (see sects. 68, 73.)

(b) This does not refer to registration under the 38 & 39 Vict. c. 87, but to the local registry of lands in Middlesex and Yorkshire, &c.

premises for securing the repayment to the said , his executors, administrators, or assigns, of the sum of 500*l.*, this day advanced by him to the said with interest for the same from this day at the rate of 4*l.* per cent. per annum, payable half-yearly. In witness, &c.—SCHEDULE. A memorandum substantially in this form has been held in *Meek v. Bayliss* (31 L. J. Ch. 448), not to require an *ad valorem* stamp as “an agreement accompanied with a deposit of title deeds :” (Davidson’s Conc. Prec., 9th edit.)

Q.—A. is owner and occupier of a manufactory and the machinery therein; he mortgages the manufactory to B., without expressly including the fixed machinery. Will the fixed machinery pass? And if so, is registration under the Bills of Sale Act necessary?

A.—The fixed machinery will pass, although not specially mentioned, being annexed to the freehold; and consequently, registration under the Bills of Sale Act is not necessary: (*Mather v. Fraser*, 27 L. T. Rep. 41.) By 41 & 42 Vict. c. 31, fixtures do not require registration unless assigned by separate deed; but trade machinery does, except fixed motive power, or fixed power, or the steam, gas, and water pipes.

Q.—You have to prepare a mortgage of a freehold cotton mill with a large amount of machinery, some fixed to the freehold and some not; what must you do to get a valid security over the whole for your client?

A.—In order to bind the machinery not fixed to the freehold the mortgage must be registered as a bill of sale under the Bills of Sale Act, 1878.

Q.—In the case of a mortgage of freeholds in Middlesex containing trade and other fixtures and movables, what is necessary to be done for the effectual security of the mortgagee?

A.—The mortgage should be registered in the Middlesex registration office, and in order to bind the movables it must be registered as a bill of sale under the Bills of Sale Registration Act, 1878.

Q.—Land held in fee simple having thereon buildings and fixtures which the owner erected for trade purposes, is mortgaged without mention of those erections; do the buildings and fixtures, or either, pass to the mortgagee? Would there be difference if the land were leasehold for years?

A.—The buildings and fixtures pass to the mortgagee in fee (*Mather v. Fraser*, 2 K. & T. 536), and also to the mortgagee of the leasehold: (*Ex parte Astbury*, 4 Ch. App. 630), and see 41 & 42 Vict. c. 31, as to trade machinery (*ante*).

Q.—Is the mortgage in either of the cases in question within the Bills of Sale Act?

A.—Neither case is within the Bills of Sale Act (*Mather v. Fraser*), but in the case of a mortgage of the tenant’s fixtures separately they would be within the Act: (see *Ex parte Barclay*, 5 De G. M. & G.; or if trade machinery be included, 41 & 42 Vict. c. 31.)

Q.—If instructed to prepare a mortgage comprising copyhold property and policies of assurance on the life of the mortgagor, what would

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solicitor?

A.—The consideration of the second to the mortgage should contain visoes for redemption, interest, covenant of sale. It should at once be executed and e

Q.—Give the property, with mortgagees.

A.—After the life interest, assignment of the life tenants. Provide Then follow covenant to pay interest after for premium, with the policy, and t

The deed should be on joint account: (

Q.—Set out (seised to the use in fee.

A.—Date; parties; recitals. 1st testatum, where, in consideration of the purchase money, the receipt, &c., the vendor first appoints and then grants and confirms unto the purchasers and their heirs. The parcels. General words. Habendum, uses, covenants for title, and testimonium. Two witnesses are desirable (and absolutely requisite for the execution of the powers) who should properly attest the same: (see *Dav. Con.*, vol. 2, part 1, p. 173 *et seq.*)

Q.—The like of a mortgage of leaseholds to two persons where the lessee's covenants are onerous.

A.—Date; parties; recitals. 1st testatum, where in consideration of the mortgage money the mortgagors covenant to repay principal and interest; 2nd testatum, where, in further consideration, &c., lessee demises the premises. Habendum to the mortgagees, their executors, administrators, and assigns, for the residue of the term less the last day thereof. Proviso for redemption, covenant to pay interest after default and the usual covenants for title on assignment of a lease, are entered into by mortgagor, and to pay the rent and perform the covenants contained in the lease. If the mortgagees are trustees a declaration should be inserted that the money is advanced by them on a joint account. Power of sale, and declaration by mortgagor to hold last day of term in trust for purchaser:

(see Dav. Con., vol. 2, part 2, p. 819 *et seq.*; after 31st Dec., 1881, a mortgage may be made by statutory form, see 44 & 45 Vict. c. 41, s. 26.)

**Q.**—What is the power of sale now implied in a mortgage deed of freeholds or leaseholds?

**A.**—Power to the mortgagee after the money becomes due to sell or concur with any other person in selling the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or private contract, subject to such conditions, respecting title, or evidence of title or other matter as he (the mortgagee) thinks fit, and to buy in at an auction or to rescind any contract for sale, and to re-sell without being answerable for any loss occasioned thereby: (44 & 45 Vict. c. 41, s. 19.)

**Q.**—When does the power of sale given to mortgagees by the Conveyancing Act, 1881, become exercisable?

**A.**—After the mortgage money becomes due, but not unless and until—

- (i.) Notice requiring payment off has been served, and default made in payment of mortgage money or part thereof for three months after such service.
- (ii.) Some interest is in arrear and unpaid for two months after becoming due.
- (iii.) Breach of covenant in mortgage, or of provisions of the Act (other than breach of contract for payment of mortgage money and interest): (a) (44 & 45 Vict. c. 41, ss. 19, 20.)

**Q.**—If A. borrows money on the security of his life interest in consols settled on his marriage, and policy of assurance effected on his life and in his own name, what inquiries should you make, as solicitor for the lender, before the completion of the mortgage, and what notice should you serve after its completion? (b)

**A.**—I should inquire of the trustees of the settlement if there were any previous incumbrance on the stock within their knowledge. I should also make the same inquiries at the insurance office. On learning that there were no prior incumbrances, and after taking an assignment of the life interest and policy, I should immediately give written notice of the assignment to the insurance company and the trustees: (Hughes' Conv. 387.)

**Q.**—What might be the consequence to your client, and also to yourself, if you omitted to make the inquiries, and serve the notices referred to in the last question?

**A.**—The client might, if it turned out that there were prior incumbrances on the stock or policy, lose the benefit of his security. By not giving notice he might be postponed to a subsequent incumbrancer, who, having no notice of the prior assignment, gave notice to the trustees and

(a) On behalf of a mortgagor, this latter provision of the Act should be negatived in the deed.

(b) Also asked thus: A. wishes to raise money on his life interest in stock standing in the name of trustees: what security would you advise, and what precautions would you take?

insurance company (*Consolidated Insurance Company v. Riley*, 1 L. T. Rep. N. S. 209); or might lose the benefit of the policy by a payment by the company. Nor could the assignee, until such notice, sue in his own name for the amount due on the policy on the death of the assured: (30 & 31 Vict. c. 144, s. 3.) If the client suffered damage as stated, he might bring an action against his solicitor: (*Arch. Nisi Prius*, 40.)

**Q.**—If a mortgage be made to two persons, and one dies, having appointed a third person his executor, can the surviving mortgagee give a valid receipt for the mortgage debt, and reconvey the estate; and if not, what provision should be inserted in the mortgage deed to enable him to do so?

**A.**—The surviving mortgagee cannot give a valid receipt for the debt and reconvey the estate; for in equity the mortgagees are tenants in common; the personal representatives of the deceased must join in the reconveyance to discharge the debt. To enable the surviving mortgagee to give a valid receipt, the deed must contain a declaration that the money is advanced by them on a joint account, and that in case of the decease of one in the lifetime of the other the receipt of the survivor shall be an effectual discharge for the whole of the money: (see *Will. R. P.* 436, 13th edit.) In mortgages executed after 31st December, 1881, the words as to the receipt being sufficient discharge will be unnecessary: (see 44 & 45 Vict. c. 41, s. 61.)

**Q.**—Sketch the outline of a mortgage in fee from A. to B., C., and D., who are trustees of the money advanced.

**A.**—In addition to the usual parts of a mortgage deed (see *post*), there should be a declaration that the money is advanced on a joint account: (*Will. R. P.* 436, 13th edit. and *supra*.)

**Q.**—When trust property is lent on mortgage, is it expedient to keep the trust out of sight, bearing in mind the provisions of the Act of 1859, making the receipt of a trustee effectual? Give your reasons.

**A.**—It is expedient to keep the trust out of sight, so that when the money is paid off the trust-deed may not become an essential link in the mortgagor's title. And it is usual to insert a declaration that the money is advanced by the trustees (not as trustees, but by name) on a joint account: (*Lewin on Trusts*, 246, 4th edit.)

**Q.**—Explain the term "proviso for redemption."

**A.**—It is the clause contained in every properly drawn mortgage deed, that upon repayment by the mortgagor to the mortgagee of the principal and interest on a certain day, the mortgagee will reconvey the estate to the mortgagor.

**Q.**—State how the covenants for title on a mortgage and a purchase differ.

**A.**—On a mortgage the covenants for title given by the mortgagor are absolute—that is, extending to the acts of the whole world; whilst those given on a purchase are qualified covenants, being restricted to the acts of the covenantor, or to himself and those through whom he claims by will or descent: (see *Will. R. P.* 448, 13th edit.)

**Q.**—Is it useful, and, if so, in what respect, to take a bond from a

mortgagor in addition to the mortgage and covenant for payment of principal and interest ?

A.—It is useful to do so when the money is to be repaid by instalments : because an action may be brought upon the bond if default is made in payment of any one of the instalments ; whereas, if the only remedy is upon covenant, no action will lie before the instalments become payable. Again, the bond might have sureties, and the mortgagee may pursue all his remedies at the same time : (Hughes' Con. 415.)

Q.—What is the meaning of an attornment clause in a mortgage, and what remedy does it confer ?

A.—The meaning of an attornment clause in a mortgage (where a mortgagor occupies the premises) is that thereby the mortgagor acknowledges the mortgagee as his landlord, at a yearly rent, usually the amount of interest on the mortgagee ; and the remedy it affords is that the mortgagee may distrain for such rent in case of non-payment.

Q.—What is an equity of redemption ?

A.—An equity of redemption is the right which equity gives a mortgagor of redeeming his mortgaged estate after the time appointed for repayment of the money due has passed : (Will. R. P. 427, 13th edit.)

Q.—How can an "equity of redemption" be barred ?

A.—1. By foreclosure.

2. By sale under a power express or implied.

3. By lapse of time (now twelve years) when the mortgagee has been in possession without acknowledgment : (37 & 38 Vict. c. 57, s. 12.)

4. By mortgagor making a second mortgage and fraudulently concealing the first from the mortgagee : (4 & 5 W. & M. c. 16.)

Q.—A. makes a mortgage to B. in fee, and then dies without heirs and intestate ; who is entitled to the equity of redemption of the mortgaged estate ?

A.—The equity of redemption becomes vested in the mortgagee, and does not escheat to the Crown ; but the mortgagee does not take it absolutely, for it is still liable for the payment of the debts of the mortgagor, and a judgment creditor has a right to redeem : (see *Beal v. Symonds*, 16 Beav. 406.)

Q.—What is meant by "tacking" a mortgage, and how can this be effected ?

A.—"Tacking" is the uniting of two incumbrances in order to postpone an intermediate one which is prior in point of time to the incumbrances tacked. Thus, if a third mortgagee, who has made his advance without notice of a second mortgage, can purchase the first legal mortgage, he may *tack* his third mortgage to the first, and so postpone the intermediate incumbrancer : for when the equities are equal the law prevails : (St. Eq. §§ 412, 413 ; *Marsh v. Lee*, 1 L. O. Eq. 494, 2nd edit.) (a)

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(a) This right was abolished by some learned (?) law reformer, by 37 & 38 Vict. c. 78, s. 7, which did away with any protection afforded by the legal estate. This mischievous section (subject to vested interests) was happily shortly repealed by 33 & 39 Vict. c. 87, s. 129, and by 46 & 47 Vict. c. 39 ; this latter section is now repealed.

**Q.**—Where there are three mortgagees, can the third in any and what manner protect himself against the second; and will the fact of his having had notice (when he advanced his money) of the second mortgage interfere with such protection?

**A.**—A third mortgagee may, by purchasing the first legal mortgage, tack his third to the first, and so postpone the second. But to enable a mortgagee to tack, he must have had no notice of a second mortgage at the *time of advancing his money*, but it will make no difference that the third mortgagee at the *time of purchasing* the first had notice of the second mortgage: (see references, *supra*.)

**Q.**—A. mortgages land to B. to secure 1000*l.* advanced at the time and also future advances, and subsequently A. mortgages the same land to C. to secure a present advance. C. gives B. notice of his mortgage. If B. afterwards makes a further advance, will that advance rank in priority to C.'s mortgage?

**A.**—Formerly, in such a case, it was held that the first mortgagee (B.) might tack against the second (C.), because it was said to be folly of the latter to lend his money on such security: (see *Gordon v. Graham*, 7 Vin. Abr.) But this case has been overruled, and it is now decided that you must not in any case have notice, at the time of advancing the money, of the intermediate incumbrance, to entitle you to tack: (see *Rolt v. Hopkinson*, 32 L. T. Rep. 69, 112; 9 H. of L. 514.)

**Q.**—Can an advance on judgment subsequent to a second mortgage be tacked to a prior security, so as to have priority in payment to the second mortgage?

**A.**—A first legal mortgagee may tack a judgment debt to his first mortgage if the advance was made without notice of the intermediate mortgage, and provided the judgment is perfected by registering the writ of execution in accordance with 27 & 28 Vict. c. 112, s. 1. But a judgment creditor cannot buy the first legal mortgage and tack, because he did not originally lend his money on the security of the land: (see *Sm. Man.* s. 529.)

**Q.**—In a register county, (a) does registration of a second mortgage amount to notice thereof?

**A.**—No; registration is not deemed constructive notice, and it was formerly thought that it would not prevent a prior mortgagee from tacking a third mortgage when he had no actual notice of the existence of a second mortgage: (*St. Eq.* §§ 401, 402; *Coote Mort.* 378, 3rd edit.) But the recent case of *Credland v. Potter* (44 L. J. Rep. 169) has decided that such charges take effect according to priority of registration, and cannot be tacked.

**Q.**—Is any notice necessary, and to whom, on taking a mortgage of the equity of redemption?

**A.**—The person lending the money should not only give the first mortgagee express notice of the proposed mortgage, but he should, if the first mortgagee will permit, put notice of the second mortgage on the principal title-deed. It is also incumbent on the mortgagor of an equity of

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(a) The register counties, it must be remembered, are only Middlesex and York, &c.



redemption to give notice of the first mortgage to the second mortgagee ; for otherwise he loses his equity of redemption : (Coote Mort. 210, 211, 3rd edit.)

*Q.*—What length of possession by a mortgagee, and in what circumstances, will bar the equity of redemption ?

*A.*—Twelve years after entry by mortgagee, and after payment of any principal or interest on account, or after any written acknowledgment of the title of the mortgagor or of his right to redeem is now sufficient : (37 & 38 Vict. c. 57, s. 7 ; Will. R. P. 458, 13th edit.)

*Q.*—Does the purchaser of an equity of redemption, without the concurrence of the mortgagee, encounter any and what risk, on the supposition that the principal and interest due on the mortgage is correctly stated by the mortgagor ?

*A.*—Yes. In case the mortgagee has taken other mortgages from the mortgagor, he may refuse to allow the purchaser to redeem, unless he discharges all the mortgages, but as to deeds executed after Dec. 31, 1881, see 44 & 45 Vict. c. 41, s. 17.

*Q.*—Can a first mortgagee purchasing and taking a conveyance to himself in fee of the equity of redemption, set up his mortgage against any of the subsequent incumbrances of which he has notice ?

*A.*—No ; but he may set it up against such of them as he had no notice of at the time he purchased.<sup>(a)</sup> He should, however, in this case take the conveyance in the name of a trustee, in order to prevent the equitable title merging in the legal estate : (Dav. Conv. 294, 2nd edit.)

*Q.*—What are the prominent disadvantages of a second mortgage, especially in the event of foreclosure or sale, and considering the danger of tacking ? Give your reasons.

*A.*—The disadvantages are that the second mortgagee gets neither the title-deeds nor the legal estate, and therefore formerly could not bring ejectment ; and if he wishes to foreclose, he must do so subject to the debt of the first mortgagee, or pay him off, and if he sells he is only entitled to the surplus after satisfying the first mortgagee. So he may be cut out by a right of tacking being exercised : (see Sm. Man. tit. 3, c. 3 ; and see *James v. James*, L. Rep. 16 Eq. 153.) An equitable mortgagee by deposit can only foreclose, and is not entitled to a sale.

*Q.*—A mortgagee in fee dies intestate : in whom do the estate and money vest, and if the mortgagor wishes to pay off the mortgage debt, what assurance, and by whom executed, is necessary for restoring the estate to the mortgagor free from the debt ?

*A.*—As the mortgagee had the legal estate, it did, on his death intestate, descend to his heir-at-law ; but in equity, as a mortgage is only considered as a security for the money lent, the personal representatives were entitled to the money, and the heir-at-law was compelled to join the personal representatives in a reconveyance of the estate, although he might not be entitled to a shilling of the money (see Will. R. P. 432, 13th

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(a) Subject to any right accruing under 37 & 38 Vict. c. 78, s. 7, previous to its repeal.

edit.); but the legal personal representatives might convey by 37 & 38 Vict. c. 78, s. 4, and in case of death after Dec. 31, 1881, by 44 & 45 Vict. c. 41, s. 30, the estate and money both vest in them.

Q.—Give the parties to, and the outline of, a deed of transfer of mortgage of land held in fee simple—the mortgagor living, the mortgagee dead intestate. Is there more than one mode of carrying it out, and does the Vendor and Purchaser Act, 1874, affect the question?

A.—Date, parties, heir of mortgagee of the first part, administrator of mortgagee of the second part, and mortgagor of the third part, and transferee of the fourth part. Recitals of mortgage, death of mortgagee, heirship, administration, amount due on mortgage, and agreement for transfer. Testatum, in consideration of mortgage money paid by transferee to mortgagee's administrator, the latter with consent of mortgagor assigns debt with all powers, &c. Habendum. Second testatum, when in further consideration as aforesaid, heir with like consent, grants premises to transferee. Habendum, &c. Covenant by heir that he has not incumbered. Covenant by mortgagor for payment of principal and interest. The Vendors and Purchasers Act, 1874, s. 4, dispensing with the necessity for *making* the heir-at-law of the mortgagee a party, does not apply in case of a *transfer* (*In re Brook's mortgage*, 46 L. J. 865); but 44 & 45 Vict. c. 41, s. 30, includes this case. It is not absolutely essential that the mortgagor should be a party, but if not, written notice of the transfer should be given him.

Q.—A testator dies in the present year possessed of two houses, one freehold and the other leasehold. Each has a mortgage upon it. By his will, he devises the freehold house to A., and bequeaths the leasehold one to B., without, in either case, saying anything about the mortgagees. He leaves an ample general personal estate. How will the respective mortgage debts be borne, and why?

A.—If the will is made since 1854, the mortgage debt on the freehold house will be borne by that property, it being provided by the 17 & 18 Vict. c. 113, that when any person shall after the 31st December, 1854, die seised of any hereditaments which shall be charged with the payment of any money by way of mortgage, and shall not by his will have signified any contrary intention, the devisee to whom such hereditaments shall be devised shall not be entitled to have the mortgage satisfied out of the personal estate, but the hereditaments so charged shall be primarily liable for the same. The mortgage debt on the leasehold house was till 40 & 41 Vict. c. 34 payable out of the personal estate, as it was held that leaseholds for years were not within the first Act: (*Solomon v. Solomon*, 10 L. T. Rep. N. S. 54.) But, by the latter Act, they are made so with respect to persons dying after the 31st December, 1877.

Q.—On a contemplated reconveyance of a mortgaged estate would you allow such reconveyance to be indorsed on the mortgage deed? If not, why not?

A.—Whenever circumstances would admit, I should advise the reconveyance to be by indorsement, because, when the mortgage deed is produced, it necessarily bears with it the evidence of the reconveyance, otherwise the reconveyance might be lost and great difficulty experienced in proving its

execution ; or even that the mortgage debt had been paid : (2 Dav. Conv. 705.)

*Q.*—A. is mortgagee in fee, and dies without devising the security, and the mortgage debt is applicable by his executor to the payment of the testator's debt ; suppose the heir-at-law of the mortgagee be unwilling or incapable to reconvey the premises (as if he be an infant), to whom is the mortgagor to pay the principal money and interest, and how is he to obtain an effectual reconveyance of the premises ?

*A.*—Formerly, if the heir-at-law of the mortgagee was unwilling or incapable of reconveying the premises, the way to obtain a reconveyance was to apply to the Court of Chancery for a vesting order under the 13 & 14 Vict. c. 60, which, if granted, had the same effect as if the heir-at-law of the mortgagee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate. If deemed more expedient, a person would be appointed to execute a conveyance to have the same effect. The money being paid to the executor, now, by 37 & 38 Vict. c. 78, s. 4, the legal personal representatives may reconvey to the mortgagor ; and by 44 & 45 Vict. c. 41, s. 30, in case of death after the 31st December, 1881, they are the only proper parties.

*Q.*—If a freehold estate in mortgage be devised or allowed to descend, is the devisee or heir-at-law entitled to have the mortgage paid out of the testator's or intestate's personal estate, there being no direction in the deed or will to that effect ; and has the law on this point been altered, and when, and in what respect ?

*A.*—Prior to the 1st January, 1855, the heir or devisee was so entitled ; but not since this date unless the mortgagor has by his deed or will, &c., signified a contrary intention. It is, however, provided that this enactment is not to affect any rights claimed under any deed, will, &c., *made* before the 1st January, 1855 : (17 & 18 Vict. c. 113.) (*a*) A will operating after the 31st December, 1867, containing a general direction that all the debts of the testator shall be paid out of his personal estate, is not to be deemed a declaration of a contrary intention so as to include mortgage debts ; something more explicit is required : (30 & 31 Vict. c. 69.) As to personal estate, see 40 & 41 Vict. c. 34.

*Q.*—A., being seised of Blackacre subject to a mortgage, devises it to B., and by his will gives his personal estate to his executors "subject to the payment of his just debts." Out of what part of A.'s estate will the mortgage debt have to be paid, and why ?

*A.*—The estate will now go to B., charged with the payment of the mortgage debt : (17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69.) A will operating after the 31st December, 1867, containing a general direction that all the debts of the testator shall be paid out of his personal estate, is not to be deemed a declaration of a contrary intention so as to include mortgage debts. Prior to the 1st January, 1855, the heir or devisee of A. was entitled to have the mortgage debt in all cases paid out of the personal estate.

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(*a*) An equitable mortgage is within this Act : (*Coleby v. Coleby*, 14 L. T. Rep. N. S. 697.)

Q.—A., possessed of a freehold farm and a leasehold shop, each subject to a mortgage, and of considerable personalty besides, by his will leaves his realty to B., and his personalty to C.; out of what fund will the mortgages be discharged, and what was the former law on the subject?

A.—Prior to the 1st January, 1855, B. would have been entitled to have had the mortgage on the freeholds paid out of A.'s personal estate; but now the stat. 17 & 18 Vict. c. 113 (Locke King's Act) enacts that the estate descends *cum onere*, unless a contrary intention appears by the will of the deceased. The mortgage on the leasehold shop will be payable out of the personalty (*Solomon v. Solomon*, 10 L. T. Rep. N. S. 54); unless A. died after the 31st of December, 1877: (40 & 41 Vict. c. 34.)

Q.—What defects in former Acts, relating to the payment of mortgage debts charged on lands passing by a will, are remedied by the Act of 1877?

A.—This Act, 40 & 41 Vict. c. 34, amends the 17 & 18 Vict. c. 113 (Locke King's or the *cum onere* Act), and 30 & 31 Vict. c. 69 (the Amendment Act), by extending the operation of those Acts to any lien for unpaid purchase money on land purchased by an *intestate*, and also extends the Acts to *Leaseholds*, in each case with respect to persons dying after the 31st December, 1877.

Q.—A. purchased the equity of redemption in a freehold house No. 1, Middlesex-street; he afterwards, as he alleges, lost the property owing to a consolidation of securities. Explain how this could be.

A.—Where a mortgagee lends two distinct sums to the same mortgagor on two securities, although they be only equitable securities, and although created by two distinct instruments, and at different times, and although the property in one be real and the other personal, the mortgagor or any one claiming under him (even a purchaser of the equity of redemption or mortgagee of the estate sought to be redeemed who had no notice of the mortgage on the estate not sought to be redeemed) cannot redeem the property comprised in one security, without redeeming the other also; for the person who has the two mortgages has a right to consolidate them, so as to insist on both being paid off together: (Sm. Man. of Eq. sec. 554.) Consequently, if the other security turned out defective, No. 1, Middlesex-street, might be exhausted in paying the deficiency. (If the mortgages or one of them is executed after the 31st December, 1881, any one mortgage may now be redeemed, unless there be inserted a provision to the contrary: (44 & 45 Vict. c. 41, s. 17.)

Q.—If A. mortgages Y. estate to B. for 1000*l.*, and Z. estate to B. for 2000*l.*, can A., adversely to B., redeem either estate upon paying the money due upon it, or must he redeem both estates? And does the same rule apply to proceedings by B. for foreclosure?

A.—A. cannot, adversely to B., redeem one of the estates without redeeming the other also, for he who seeks equity must do equity. And this rule also applies whether the suit be for foreclosure or redemption: (*Watts v. Symes*, 1 De G. M. & G. 240; *Vint v. Padgett*, 32 L. T. Rep. 66; and see last answer where mortgage executed after the 31st December, 1881.)

**Q.**—If A., having two estates, Blackacre and Whiteacre, first mortgages Blackacre to B., and subsequently mortgages Whiteacre to him to secure another sum, and then conveys the equity of redemption of Blackacre to C., subject to the first-mentioned mortgage, will C. acquire a title unaffected by the money secured upon Whiteacre?

**A.**—No; C. will not be able to redeem the equity of redemption in Blackacre without redeeming Whiteacre also, even though he bought the equity of redemption in Blackacre without notice of the charge on Whiteacre, especially if Whiteacre is a defective security: (*Vint v. Padgett*, *sup.*; Sm. Man. sect. 554, and see *suprd.*)

**Q.**—A. mortgages Blackacre to B. for 1000*l.*, and subsequently Greenacre to C. for 500*l.* C. takes from B. a transfer of his mortgage. In pursuing his remedies, can C. consolidate these two mortgages against A., and how would it be if, previously to the transfer of C., A. has sold the equity of redemption in Blackacre to E.?

**A.**—C. can consolidate his two mortgages against A., and E. cannot redeem one mortgage without the other: (see *Vint v. Padgett*, 1 Gif. 446; Sm. Man. sect. 554, and see *suprd.*)

**Q.**—Mortgage to A. for 1000*l.*, then to B. for 800*l.*; A. sells his charge to C., a stranger, for 700*l.* Is C. entitled, as against B., to the whole debt of 1000*l.*, or only to the 700*l.* he paid?

**A.**—In this case C. is entitled as against B., the second mortgagee, to the whole debt of 1000*l.* He stands in the place of the first mortgagee, after the assignment of the debt to him by the first mortgagee. But it is otherwise with respect to heirs, trustees, agents, or executors of the mortgagor, as a general rule: (Coote Mort. 303, 3rd edit.)

**Q.**—A. mortgages freehold estate to B., with power of sale, and then dies. B. then exercises his power of sale, and after retaining principal and interest there is a surplus. To whom will this surplus belong, viz., to the heir or personal representatives of the mortgagor?

**A.**—A. being dead, the surplus, after retention by B. of his principal, interest, and costs, will belong to the heir or devisee, and not to the personal representatives of A., for previously to the sale he would have been entitled to the estate, subject, of course, to the mortgage: (Sm. Man. sect. 544.)

**Q.**—An estate is mortgaged to C. in fee; he enters as mortgagee and then dies, leaving a widow. Is the widow dowable out of this estate?

**A.**—The widow of C. is not dowable out of this estate; unless, indeed, all equity of redemption was clearly barred at the husband's death: (Coote Mort. 510, 3rd edit.)

**Q.**—What covenants is it usual for mortgagees to enter into?

**A.**—Mortgagees merely covenant that they have done no act to incumber. This is now implied by 44 & 45 Vict. c. 41, s. 7, where they are expressed to convey as mortgagees.

**Q.**—What is the effect of cancelling or destroying a mortgage deed?

**A.**—If it is found so cancelled in the mortgagee's possession at his death, it is as much a release as cancelling a bond, but it does not convey or revest the estate in the mortgagor, for that must be done by some deed:

the legal estate in such a case descends upon the heir; but there being no debt at law or in equity, at least upon the mortgage, the court holds the heir to be trustee for the mortgagor: (Sm. Man. sect. 587.) In case of death after the 31st December, 1881, the estate will now become vested in the personal representative: (44 & 45 Vict. c. 41, s. 30.)

**Q.**—What amount of interest can be reserved on a mortgage? And can a mortgagee stipulate that if the interest be not paid at the proper time, it shall be converted into principal?

**A.**—Since the repeal of the usury laws, any amount of interest may be reserved on a mortgage: (17 & 18 Vict. c. 90.) The mortgagee cannot, in the first instance; stipulate that if the interest be not paid at the time it shall be converted into principal. To do this the interest must first become due, and a written agreement to convert be signed: (Sm. Man. sect. 517.)

**Q.**—Is it legal to take procuration money on a loan of money by mortgage, and how much, and who is entitled to it—the solicitor for the mortgagee, or the solicitor for the mortgagor?

**A.**—Yes; it is legal to take procuration money on a loan of money by mortgage. By 12 Anne, c. 16, 5s. for every 100*l.* is allowed, but more may now be taken: (17 & 18 Vict. c. 90.) The solicitor for the mortgagee is entitled to it: (see 26 Leg. Ob. 536; *Ld. St. Leonards' Handy Book*, 91, 6th edit.)

**Q.**—Can a mortgagee in possession, whose estate is absolute at law, cut down timber?

**A.**—Not unless his security is defective, and if he does so an account will be decreed, and the produce applied, first, in payment of the interest, and then in sinking the principal, and equity will enjoin him. If the security prove defective, the court will not restrain him from felling timber, the produce being of course applied in ease of the estate: (*Coote Mort.* 367, 3rd edit.; Sm. Man. sect. 559.) But in mortgages executed after the 31st December, 1881, a mortgagee in possession may cut and sell timber ripe for cutting, and not left standing for shelter or ornament, unless a contrary intention is expressed: (44 & 45 Vict. c. 41, s. 19.)

**Q.**—A mortgagee in fee allows the mortgagor to remain in possession for more than twenty years, and receives no interest or acknowledgment from him. Has he any, and what, right against the mortgagor or against the land?

**A.**—He has simply a lien on the title deeds in his possession.

**Q.**—By the Trustees and Mortgagees Act, 1860, what power of sale was given to mortgagees under an instrument executed after the passing of the Act, in what events does it arise, by whom exercisable, and under what restrictions? What are the powers by the Act conferred on mortgagees of appointing a receiver?

**A.**—By the 23 & 24 Vict. c. 145, it is provided that the mortgagee, his executors, administrators, and assigns, shall (1) after the expiration of a year from the time when the principal money became payable, or (2) if the interest thereon be in arrear for six months, or (3) after the omission



to insure, have the following powers to the same extent as if conferred by the mortgagor: 1. Power to sell or concur in selling the property by public auction or private contract, and to rescind contracts and buy in and re-sell. 2. Power to insure the property, &c. 3. Power to appoint a receiver of the rents and profits of the property: (sect. 11.)

But no sale is to be made until after six months' written notice, given to the mortgagor, or affixed on some conspicuous part of the property; purchasers, however, are protected, and any persons injured may proceed against the person selling: (sects. 12 and 13.)

As to the receiver, if a person has been mentioned in the mortgage deed as a receiver, the mortgagee may appoint him, or if no one be named, may, by notice in writing, require the mortgagor to appoint a receiver within ten days, and on default may (by writing) himself appoint a receiver: (sect. 17.) With respect to deeds executed after the 31st December, 1881, the above sections will be repealed and the powers conferred by 44 & 45 Vict. c. 41, ss. 19, 24 (see *ante*) substituted.

**Q.**—When and to what extent may a mortgagee insure property comprised in his security, under the powers of the Conveyancing, &c., Act, 1881?

**A.**—He may do so at any time after the date of the deed to the extent (a) specified in the mortgage, or (b) to two-thirds of the amount that would be required to restore in case of total destruction. But the provision is not to apply (i.) when there is a declaration in the mortgage that no insurance is required; (ii.) when an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage; (iii.) when there is no stipulation in the mortgage, and an insurance is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is authorised to insure: (ss. 19 and 23.)

**Q.**—State the essential points to be observed in framing a power of sale on a mortgage in fee.

**A.**—The more important provisions are now implied (see *ante*, p. 261), but if the mortgage is to two persons, the power should enable the survivor, &c., to sell.

**Q.**—Can a mortgagee in fee, after selling the estate, proceed, or not, on the covenant to pay?

**A.**—Yes; if the sale of the property did not realise enough to pay principal, interest, and costs of sale. If, however, the mortgagee forecloses and then sells, and afterwards sues the mortgagor, proceedings will be stayed, because so suing re-opens the foreclosure: (*Lockhart v. Hardy*, 9 Beav. 349; Sm. Man. sect. 548.)

**Q.**—If a mortgage deed contains a covenant for the insurance of the buildings on the premises, and the mortgagor fails to perform that covenant, has the mortgagee, in the absence of any provision for the purpose in the deed, any power to effect an insurance, and to recover the amount, with or without interest?

**A.**—On breach of the covenant to insure, the 23 & 24 Vict. c. 145 (unless negatived by the mortgage deed) gives the mortgagee under a deed made since the Act, and previous to 1882, power to insure the



premises from loss or damage by fire, and to add the premiums so paid to the principal money at the same rate of interest: (see ss. 11, 32.) In deeds executed after the 31st December, 1881, unless the power is negatived the mortgagee may at once insure and tack the premiums: (44 & 45 Vict. c. 41, s. 19; see *ante*, p. 271.)

*Q.*—What covenants and powers are usually inserted in a mortgage? Is there any, and if any what, recent legislation on the subject?

*A.*—The covenants usually inserted in a mortgage of land not registered under the 25 & 26 Vict. c. 53, or 38 & 39 Vict. c. 87, are to pay principal and interest (absolute covenants for title are now implied), and to keep the premises in repair. Then follow the powers of sale on default of payment of principal and interest. But the 23 & 24 Vict. c. 145, s. 11, provided that the mortgagee, his executors, &c., should, in the events above stated, have a power to sell, &c., as before detailed, and 44 & 45 Vict. c. 41, contains enlarged powers with respect to deeds executed after the 31st December, 1881.

*Q.*—What covenants are now implied in mortgages of freeholds and leaseholds respectively?

*A.*—By 44 & 45 Vict. c. 41, s. 7, when the mortgagor conveys and is expressed to convey as beneficial owner, the following covenants will be implied, viz.: Right to convey, quiet enjoyment, freedom from incumbrances and further assurance; and in the case of leaseholds the following further covenants, viz., that the lease is valid, and for payment of rent and performance of covenants.

*Q.*—State briefly the ordinary form and construction of a mortgage deed of real estate.

*A.*—Date, parties, recitals, testatum, containing the consideration, receipt, operative words, parcels, habendum, proviso for redemption and re-conveyance and proviso for the mortgagor to enjoy until default; then follow the covenants and powers set out *supra*. (*a*)

*Q.*—A. desires to mortgage his house in Belgrave-square, held on lease for ninety-nine years, to B., to secure him the loan of 5000*l*. Write out *verbatim* the habendum in such mortgage deed, and state the principle on which you would frame it, and enumerate shortly the covenants and provisos that you would insert in such mortgage deed.

*A.*—The habendum would run thus: "To have and to hold the said hereditaments and premises hereby demised unto the said B., his executors, administrators, and assigns, for all the residue now to come of the said term of ninety-nine years, except the last ten days thereof, subject to the proviso for redemption hereinafter contained:" (see *Prid. Conv.* 538, 9th edit.) The habendum is framed by way of demise or under-lease, as it thus protects the mortgagee from being liable to the rents and covenants in the lease: (*Will. R. P.* 433, 13th edit.)

The provisos would be, for redemption on repayment of the money lent

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(*a*) A charge under the 38 & 39 Vict. c. 87, consists of the number of premises on the register, name of registered proprietor, consideration, charge on the premises in favour of the mortgagee, of the principal and interest, power of sale after a certain date, and signature of proprietor witnessed by a solicitor (Form 20).

and for quiet enjoyment by the mortgagor until default. Covenants by the mortgagor (A.) for payment of principal and interest (the usual covenants relating to the title are now implied by 44 & 45 Vict. c. 41, s. 7 (1 D.)); as to power of sale, see *ante*, p. 271. (a)

Q.—Draw in skeleton (*i.e.*, stating the name or short effect only of each clause) a mortgage by a married woman of a freehold estate belonging to her, and advise on the steps necessary for the due completion of the mortgage security.

A.—The date, parties (husband and wife), mortgagors of the one part, mortgagee of the other part, recitals, testatum, which includes consideration, receipt, operative words, by which the wife, with the concurrence of her husband, conveys and the husband confirms, parcels, habendum, proviso for redemption, covenants by husband for payment of principal and interest, power of sale, &c. The deed must be executed by husband and wife and acknowledged by the wife, who must be separately examined before a judge or a commissioner, and a memorandum of the acknowledgment indorsed as required by the 3 & 4 Will. 4, c. 74, and rules of December, 1882. If married after 1882, or the property is acquired by her subsequent to that time, she can convey, &c., as a *feme sole*: (45 & 46 Vict. c. 75.)

Q.—State concisely the requisite contents and proper form of making a mortgage by A. B. of long leaseholds of house property to C. D., E. F., and G. H., who are trustees lending money.

A.—The mortgage should be by way of under-lease (see *ante*). After recitals of the lease and agreement for loan comes the assignment of the premises to hold to the mortgagees for the residue of the term, less (say) ten days, as joint tenants. Then follow provisos, covenants and power of sale, as stated *supra*. There should also be a declaration that the money is advanced on a joint account, and see 44 & 45 Vict. c. 41, s. 61.

Q.—Mention the principal parts of a conveyance in fee by a mortgagor and mortgagee to a purchaser.

A.—Date. Parties. Recital of mortgage; of money due on mortgage, and of contract of purchase. Testatum, wherein the mortgagee, in consideration of the mortgage money, at the request of the mortgagor grants and conveys, and the latter, in consideration of the remainder of the purchase money, grants, ratifies, releases, and confirms the estate to the purchaser and his heirs, &c. Habendum: (Covenants for title are now implied *ante*): (Prid. Conv. 262, 9th edit.)

Q.—How is a security effected upon personal chattels?

A.—Either (1) by way of conditional bill of sale duly registered under the 41 & 42 Vict. c. 31, and the 45 & 46 Vict. c. 43; or (2) by depositing the chattel itself with the lender, accompanied by a memorandum of deposit: (St. Eq. §§ 1030-1033; and notes to *Coggs v. Bernard*, 1 Sm. L. C.) A mortgage of a personal chattel may be made without deed: (*Florey v. Denny*, 7 Exch. 581.)

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(a) We may here mention that leaseholds, of which twenty-one years are still to come, or for a life or lives or years determinable on life or lives, may be registered under the 38 & 39 Vict. c. 89, and conveyed by its forms: (see sect. 11.)

**Q.**—A ship is mortgaged to A. At subsequent dates a second mortgage of the same ship is made to B., and a third mortgage to C. All three mortgages are in the usual statutory form, and have been registered in order of date. What are the rights of C., as between himself and the mortgagor and prior mortgagees respectively, with regard to the realisation of his security by sale of the ship?

**A.**—As against the mortgagor every registered mortgagee may dispose of the ship or share mortgaged, but C. cannot do this in the case given without the concurrence of A. and B., prior registered mortgagees, except under the order of some competent court: (17 & 18 Vict. c. 104, ss. 66, 69, 71.)

**Q.**—Can a mortgagee of real estate, without express power, sell the mortgaged property? Does the same rule apply in the case of a mortgage of personal estate?

**A.**—A mortgagee of real estate could not formerly have sold the mortgaged estate without an express power, either contained in the mortgage deed or obtained from the Court of Chancery, under the 48th section of 15 & 16 Vict. c. 86; (a) but now, in certain events, he may, as before detailed, sell the mortgaged estate, although the deed contains no power of sale. As to mortgages of personal property, the mortgagee may, as a general rule (and could formerly), on due notice, sell the property instead of foreclosing: (St. Eq. § 1031.)

**Q.**—Is a mortgagee with a power of sale justified between himself and the mortgagor in selling by auction, with a condition that he shall be at liberty to rescind the sale in case of any objection to the title which he may be unable or unwilling to remove; and is a purchaser buying at a low price under such a condition secure against further claims by a mortgagor?

**A.**—The mortgagee is so justified, and the purchaser is secure against further claims by the mortgagor. Wherever it would be prudent in an absolute owner to sell with such a condition, it is not imprudent as affecting the mortgagor; and this is an ordinary and reasonable condition for an absolute owner to introduce into his conditions of sale: (*Faulkner v. The Equitable Reversionary Society*, 4 Drew. 354.) (b)

**Q.**—In an absence of an express bargain, can a mortgagor pay off, at any time, his mortgage debt, and can a mortgagee call in his mortgage money at any time?

**A.**—The mortgagor cannot, in the absence of express contract, after the time of payment has passed, pay off the mortgage debt without first giving six calendar months' notice of his intention to do so: (*Shrapnell v. Blake*, 2 Eq. Ca. Ab. 603, pl. 24.) The mortgagee may, however, after forfeiture, enforce his security without notice: (*Keech v. Hall*, 1 Sm. L. C.)

**Q.**—What alterations in the law have the Judicature Acts made in actions by mortgagor in respect of the mortgaged land?

**A.**—A mortgagor, if entitled for the time being to possession or receipts

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(a) This section is now repealed by 44 & 45 Vict. c. 41, s. 25.

(b) But the unwillingness must be founded on substantial and reasonable grounds, and not a mere change of intention or caprice on the part of the vendor: (*Duddell v. Simpson*, 15 L. T. Rep. N. S. 305.)

of the rents and profits, if no notice to enter into possession or receipt, &c., have been given by the mortgagee, may sue in his own name for the recovery of possession, or of the rents and profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, unless the cause of action arises upon a lease or other contract made by him jointly with any other person : (1873 Jud. Act, s. 25, sub-sect. 5.)

**Q.**—What are the remedies of a mortgagee under a well-drawn mortgage-deed, and show how they differ from those of an equitable mortgagee by simple deposit of title-deeds ?

**A.**—In a well-drawn mortgage, the mortgagee, after default, can enter and receive the rents and profits ; for which purpose, if necessary, he can bring his action to recover possession ; or he can give notice to the tenants to pay their rents to him ; or he may appoint a receiver. He can sell under his power of sale, he can also sue on his covenant, and can insure, when there is no insurance, and tack premiums to his principal ; he can also bring his action of foreclosure in the Chancery Division. This latter is the only remedy of an equitable mortgagee (see *James v. James*, 42 L. J. Rep. 386, Eq.), in addition to his right of action for his principal and interest.

**Q.**—What are the rights and remedies of a mortgagee ? (a)

**A.**—He may, after default, evict the mortgagor, or issue a writ for foreclosure in the Chancery Division of the High Court, to proceed to sell the premises, or appoint a receiver ; he has a right to tack a third mortgage to a first, where he made the further advance without notice ; he may evict any lessee of the mortgagor subsequent to the mortgage, and may give the tenant, who was such prior to the mortgage, notice to pay rent, and in default distrain ; and he may, if in possession, and the property be of sufficient value, vote at elections and gain a settlement under the Poor Laws : (see Sm. Man. tit. 3, c. 3, s. 1 ; Coote Mort. 3rd edit.)

**Q.**—A. B., is possessed of two leasehold houses, each of which is underlet for the whole term less three days. He mortgages one of the houses by assignment, and the other by sub-demise for the whole term less ten days. The mortgagees enter into possession. Can both, or either, and if either which, and why, distrain for rent in arrear accrued after the entry ?

**A.**—The assignee of the whole term, having the reversion, can distrain, but the mortgagee by demise for want of it cannot do so.

**Q.**—A. without signing a document borrows a sum of money from B., and leaves with him the title-deeds of an estate for the purpose of having a mortgage of the property prepared for securing the advance ; A. afterwards refuses to execute the mortgage. Has B. any, and what, right over the land, and, if so, what course ought he to adopt to enforce it ?

**A.**—B., as equitable mortgagee, should issue a writ in the Chancery Division claiming specific performance of the contract, and that A. be compelled to execute a legal mortgage to him, or in default that a foreclosure be ordered ; and he should register his action as a *lis pendens*.

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(a) The following question may be answered from the foregoing : If mortgage money be not paid at the appointed time, what are the remedies of the mortgagee ?

**Q.**—Is there any mode by which a clergyman can mortgage his benefice, or charge it by warrant of attorney or otherwise?

**A.**—No (save as stated *ante*, p. 220); for by the 13 Eliz. c. 20 (a), all charges upon benefices with cure of souls (even for life only, or by way of lease) are made void: (*Shaw v. Pritchard*, 10 B. & O. 241.) Also a warrant of attorney to confess judgment, if it appears upon its face that the benefice is intended to be sequestered, is void: (*Flight v. Salter*, 1 B. & Ad. 673.) It has also been held that a judgment entered upon a warrant of attorney and duly registered, is not a charge on an ecclesiastical benefice under the 1 & 2 Vict. c. 110, s. 13: (*Hawkins v. Gathercole*, 24 L. T. Rep. 241.)

### CHARGE BY JUDGMENT.

**Question.**—What was the effect of a judgment registered under the 1 & 2 Vict. c. 110, upon freehold and copyhold estate of the debtor at law and in equity; and who were protected by that statute and the statute 2 Vict. c. 11, against such judgments in equity?

**Answer.**—The effect was to bind all the lands of the judgment debtor (including copyholds) of which he, or anyone in trust for him, was at the time of entering up judgment, or at any time afterwards, seised, possessed, or entitled, or over which he had an absolute power of appointment. But purchasers and mortgagees without notice were by these Acts protected so far as not to be bound further than under the old law: (Sug. Conc. V. 383, 387.)

**Q.**—Are freehold and copyhold estates liable to judgment debts? If so, what proceedings are necessary thereunder?

**A.**—Both freeholds and copyholds are liable to judgment debts. If the judgment was entered up between the 23rd July, 1860, and the 29th July, 1864, it must, in order to bind lands in the hands of purchasers and mortgagees, even with notice, be registered, (b) and a writ of execution issued and registered (before the conveyance or mortgage is completed), and actually put in force within three calendar months from its registration: (1 & 2 Vict. c. 110, ss. 13, 19; 23 & 24 Vict. c. 38, s. 1.)

If the judgment be entered up after the 29th July, 1864, the lands are not bound thereby until such lands are actually delivered in execution. The writ of execution must, however, be duly registered in the name of the debtor; *but no prior or other registration of such judgments is now necessary*: (27 & 28 Vict. c. 112, ss. 1, 3.) (c)

**Q.**—By what recent Act, and under what regulations, do judgments and processes of execution thereon affect purchasers and mortgagees?

(a) This Act was repealed by the 43 Geo. 3, but revived by 57 Geo. 3: (see also 17 Geo. 3, c. 52, and 28 & 29 Vict. c. 69, *et ante*, p. 220).

(b) As to how a judgment is registered (see *ante*, p. 124).

(c) The following question may be answered from the text: By the Act of 1860 to amend the law of real property, what is necessary, after entering up a judgment, to be done in order that the same may affect land as to the purchaser or mortgagee; and does it make any difference if such purchaser or mortgagee have notice or not of the judgment?

And this: When does a judgment at law become a charge upon real estate?

A.—The 27 & 28 Vict. c. 112 (passed 29th July, 1864), is the Act referred to by the examiners, to the effect set out in the preceding answer. As to the construction of this Act, and the inquiries directed on a sale of the lands, see *Garden v. London, Chatham, and Dover Railway Company* (15 L. T. Rep. N. S. 644).

Q.—A. has a decree in Chancery against B. for the payment of a sum of money, how is A. to make that sum a charge upon B.'s estate, and under what authority?

A.—Such a decree has the effect of a judgment at law (1 & 2 Vict. c. 110, s. 18), and the statutes above set out apply thereto.

Q.—When do judgments bind leasehold estates, and where should searches be made as to such incumbrances?

A.—Leasehold estates are now subject to judgments in the same manner as freeholds: (1 & 2 Vict. c. 110, s. 13; 23 & 24 Vict. c. 88, s. 1; 27 & 28 Vict. c. 112, ss. 1, 3.) Search should be made in the Registry of Judgments, Central Office: (see *Prid. Conv.* 161 *et seq.*, 9th edit.)

Q.—Do judgments against a mortgagee affect the mortgaged estate in the hands of a purchaser from the mortgagor, who pays off the mortgage out of the purchase money? and does notice to the purchaser of the judgment prior to the completion of the purchase make any difference in such a case?

A.—In such a case the mortgaged lands are not affected by the judgments in the hands of the purchaser (18 & 19 Vict. c. 15, s. 11); nor does it make any difference if he has notice of the judgments: (*Greaves v. Wilson*, 28 L. J. 103; see also 27 & 28 Vict. c. 112, *sup.*)

Q.—Can a person having an absolute power of appointment over real estate defeat judgments entered up against him subsequently to the vesting of such power in him, in any and what way? And state the reason for your answer.

A.—Yes, by selling to a purchaser, without notice, who is not bound by 2 Vict. c. 11.

Q.—Is a purchaser under an appointment, as in the last query, affected, and how, by the statutes for the abolition of arrest on *mesne* process, or any of them?

A.—Yes; such a purchaser was first made liable to judgment debts by the stat. 1 & 2 Vict. c. 110, but was protected by the stat. 2 Vict. c. 11, if without notice.

Q.—At what time does a judgment operate on land in a register county? and is there any and what difference as to the period of its so doing in Middlesex and Yorkshire?

A.—In Middlesex judgments operate on land from the time they are memorialised: (7 Anne, c. 20, s. 18.) In Yorkshire, in the North Riding, any judgment registered within twenty days after the signing of it is available in the same manner as if it had been registered on the day it was signed: (8 Geo. 2, c. 6, s. 88.) And in the East and West Ridings, and in Kingston-upon-Hull, thirty days are allowed for the registering of judgments: (5 Anne, c. 18, s. 11; 6 Anne, c. 35, s. 28.) Therefore, where the estate lies in Yorkshire or Kingston-upon-Hull, recent judg-



ments should be searched for in the Registry of Judgments : (Prid. Conv. 161 *et seq.*, 9th edit.)

*Q.*—If a judgment has been entered up against a man seised in fee of lands for a debt, how is such judgment to be enforced ?

*A.*—A writ of *elegit* must be sued out ; so called because it was stated in the writ that the creditor had elected (*elegit*) to pursue the remedy the statute (18 Edw. 1) had provided for him : (see Will. R. P. 85, 13th edit.) In order to bind the lands now this writ, with the sheriff's return thereon, must be registered in the Registry of Judgments, and possession of the land, if necessary, recovered by action.

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### USES AND TRUSTS, AND POWERS.

*Question.*—What is the difference between uses and trusts ? and state the form of expression by which each is created.

*Answer.*—A use is that interest which the Statute of Uses (27 Hen. 8, c. 10) transfers into possession, thereby making the *cestui que use* complete owner of the lands, as well at law as in equity. A trust, when used in the sense of an interest, is the equitable or beneficial interest in or ownership of real or personal estate unattended with the possessory and legal ownership thereof : (Sm. Man. s. 224 ; 1 St. C. 354, 8th edit.) As to the form of expression by which each is created, see *infra*.

*Q.*—State the principal provisions of the Statute of Uses, and the causes which led to its enactment.

*A.*—It enacts that where any person shall be seised of lands, &c., to the use, confidence, or trust of any other person, such latter person (the *cestui que use*) shall from thenceforth stand and be seised &c., of the land of and in the like estate as he has the use, &c., and that the estate of the person so seised to uses shall be deemed to be in the *cestui que use* in such quality, manner, form, and condition as he had before in the use.

The causes which led to its enactment were to prevent the evils arising from uses, (a) and its object to annihilate uses altogether ; but, so far from attaining this end, it became the means of introducing a new mode of conveyance : (see *Tyrrel's case*, Tudor's L. C., p. 274 ; 1 St. C. 360, 363, 8th edit.)

*Q.*—The Statute of Uses has been called the "Key-stone of modern Conveyancing : " illustrate this.

*A.*—The object of the statute was to abolish uses by converting them into legal estates, but the courts having held that the statute only applied to the first use, subsequent uses and trusts remained equitable estate as before the statute. It thus became the foundation of the modern system of uses and trusts, a mode of conveyance admirably adapted to the

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(a) Lord Bacon, when speaking of them, says : " A man that had cause to sue for land knew not against whom to bring his action, or who was the owner of it. The wife was defrauded of her thirds, the husband of his curtesy, the lord of his wardship, relief, heriot, and escheat ; the creditor of his extent for debt, and the tenant of his lease : " (Bac. Use of the Law, 158.)



exigencies of mankind; to effect this nothing more is necessary than to insert in them a limitation of one use upon another in the manner described in the chapter on Uses and Trusts: for while the first use is executed by the statute and becomes legal estate, the second retains, under the name of trust, the equitable character designed: such is the principle of conveyances under the Statute of Uses, considered as a class. They comprise not only the feoffment to uses, the covenant to stand seised, and the bargain and sale, but that species called a lease and release (added to their number soon after the statute passed), and a fifth now recently introduced, which may be denominated a grant to uses, and this last has nearly superseded all the rest in the practice of conveyancing: (1 St. C. 533, 8th edit.)

**Q.**—What is a (*a*) shifting use? and give an instance.

**A.**—It is a future or executory interest created under the Statute of Uses. An instance occurs in an ordinary marriage settlement of lands: *ex. gr.*, suppose A. to be a settlor, the lands are conveyed by him, by the settlement executed a day or two before the marriage, to trustees “to the use of A. and his heirs until the intended marriage shall be solemnised, and from and immediately after the solemnisation thereof,” to the uses agreed on: (Will. R. P. 292, 13th edit.; 1 St. C. 545, 8th edit.)

**Q.**—Give an instance of an executory use; and by what instruments may land be limited to executory uses?

**A.**—If a man covenant to stand seised to the use of another in fee seven years hence; or if an estate be conveyed to A. and his heirs, to the use of B. and his heirs at the death of C., such uses are said to be *executory*, because they are not executed by the Statute of Uses until they come into *esse* by the arrival of the period contemplated: (1 St. C. 544, 8th edit.; Cruise on Uses, 81, 148.)

Land may be limited to executory uses by a deed operating under the Statute of Uses, or by will (see Will. R. P. 292, 13th edit.); but not by a deed operating at common law: (1 St. C. 544, 8th edit.)

**Q.**—Give a concise description of a springing or shifting use, and show how they may be created.

**A.**—They differ in this, that a springing use is one limited *in futuro* independently of any preceding use; whereas a shifting use is where the use is made to shift from one to another on a given event. They may be created by deed operating under the Statute of Uses, or by will: (Cruise on Uses, 81, 148; 1 St. C. 544, 545, 8th edit.)

**Q.**—How is a condition for taking the names and arms of a settlor enforced?

**A.**—By way of shifting use: as where lands are vested in trustees to the use of A. and his heirs, provided he, within a given time, takes the name and arms of the settlor, and in default then to the use of B. and his heirs: (Will. R. P. 294, 13th edit.)

**Q.**—What is the difference between an executory devise and a shifting use?

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(*a*) Shifting uses are also frequently termed secondary uses.

**A.**—An executory devise is a conditional limitation by will ; a shifting use is the same by deed operating under the Statute of Uses : (see further, *ante*, p. 202.)

**Q.**—Are shifting uses subject to the restraints against perpetuities ; and are they destructible, and if so, by what means ?

**A.**—Shifting uses are subject to the restraints against perpetuities. But in their nature they are indestructible ; although, if subsequent to, or in defeasance of, an estate tail, they may be barred by the same means as remainders expectant on the determination of an estate tail : (Will. R. P. 292, 320, 13th. edit. ; Fearn. Cont. Rem. 390, 418, 423, 441.)

**Q.**—Settlement of fee-simple estates to the use of A. for life, remainder to the use of B. and his heirs, in trust for C. and his heirs. Do B. and C. respectively take legal or equitable estates ? and to whom must A. surrender his life estate in order to cause its merger ?

**A.**—B. takes the legal estate in remainder, and C. will have only the equitable estate ; A. must therefore surrender to B., in order to cause a merger.

**Q.**—A feoffment or grant to A. and his heirs to the use of B. and his heirs : what estates, legal and equitable, do A. and B. take respectively ? and explain the operation of the Statute of Uses in the above limitation.

**A.**—B. will take both the legal and equitable estate. For the Statute of Uses transfers the estate to B., the *cestui que use*, in the same manner as if A., the feoffee to uses, after the conveyance to him, had actually conveyed his estate to B., thus passing to him a legal instead of an equitable interest ; such uses, in fact, taking effect out of the seisin of the feoffee immediately on the execution of the conveyance, he being considered a mere conduit pipe to the *cestui que use* : (see Will. R. P. 160 *et seq.*, 13th edit. ; 1 St. C. 369, 8th edit.)

**Q.**—A. by bargain and sale conveys a fee simple estate to B. and his heirs, to the use of C. and his heirs. What estate, legal or equitable, do B. and C. respectively take ?

**A.**—The legal estate is vested in B. and his heirs, and C. and his heirs take but an equitable interest ; for, by the effect of the bargain and sale, the alienee has but a use, which is executed by the Statute of Uses, and as a use cannot be limited on a use, it follows that any further use, limited by the conveyance, will not be executed, but remain a mere equitable interest : (see *Tyrrell's case*, L. C. Conv. 251 ; 1 St. C. 533, 8th edit.)

**Q.**—A. by bargain and sale duly enrolled, conveys to B. and his heirs, to the use of C. and his heirs, in trust for D. and his heirs. What estates or interests do B., C., and D. respectively take ?

**A.**—B. will take the legal fee, and he will hold in trust, not for C. (who takes nothing), but for D. and his heirs : (see Co. Lit. 271 b. note ; 1 St. C. 533, 8th edit.)

**Q.**—Feoffment to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs. Explain the operation of the Statute of Uses in the above limitation.

A.—The statute executes the use in B. and his heirs, and gives him the legal estate; and as a use cannot be limited on a use, C. has merely an equitable interest: (see Will. R. P. 160, 13th edit.; 1 St. C. 369, 8th edit.)

Q.—In whom would the legal estate vest under a statutory release and grant to C. and his heirs to the use of D. and his heirs?

A.—The legal estate would vest in D. and his heirs under such a conveyance: (see references *supra*.)

Q.—Devise since the Wills Act to A. and his heirs, in trust to apply the rents for specified purposes for a limited time, and then in trust for B. and his heirs. In whom is the legal estate?

A.—The legal estate will remain in A. in order to enable him to perform his trust; but as soon as the purposes for which the trust was raised are satisfied, the legal estate will be shifted to B. and his heirs. For here A. has for a time an active duty to perform, and when such is the case, the Statute of Uses does not execute the use until the duties are performed. But as the trustee only takes the legal estate commensurate in duration with the period during which the duties are to be performed, as soon as those duties are fulfilled the statute operates: (see 1 St. C. 605, 8th edit.; Will. R. P. 220, 13th edit.)

Q.—Where an estate is devised to A. and his heirs in trust to permit B. and his heirs to receive the rents and profits, what estate does B. take?

A.—The statute will execute the use in B. and give him the legal estate: for here A. has no active duty to perform: (1 St. C. 605, 8th edit.; 1 Hughes' Pract. Sales, 292, 2nd edit.)

Q.—In a devise of real estate to the use of A. in fee in trust for B. in fee, A. by deed disclaims the estate; what is the effect of such disclaimer, viz., does it vest the estate in the testator's heir or in B.? And who can convey the land to a purchaser?

A.—The legal estate in the land will, on A.'s disclaimer, go to the testator's heir-at-law, who will be the proper party to convey such legal estate; but B. has the equitable interest in the land, and should be a party in order to make a good title to a purchaser: (2 Jarm. Wills, ch. 34.)

Q.—Conveyance unto and to the use of A., B., and C., and their heirs. What estates do they respectively take?

A.—A., B., and C. will take the legal and equitable fee as joint tenants: (Will. R. P. 136, 159, 13th edit.)

Q.—Where land is conveyed "unto and to the use of A. and his heirs, upon trust for B., his heirs and assigns," is A. in by the common law or by the statute?

A.—A. is in by the common law, as the seisin and the use are both vested in the same person, and the statute only applies where a person is seised to the use of *another*. B. takes the equitable estate, as the statute does not execute a use upon a use.

Q.—Suppose T. S. make a feoffment to the use of A. for life with remainder to the use of the heirs of his (T. S.'s) body; does any and what

estate exist in T. S. ? and distinguish between the above case and that of a feoffment by T. S. to the use of A. for the life of him (T. S.) with remainder to the use of the heirs of his (T. S.'s) body.

A.—In the first instance, there is a resulting use to T. S. for life, after A.'s life estate, which, coalescing with the limitation to the heirs of his body, gives him an estate tail, under the rule in *Shelley's case*, besides his reversion in fee. In the second case, where the feoffment is made to the use of A. for the life of T. S., with remainder to the heirs of the body of T. S., there is no resulting use for life, but only the reversion in fee in the feoffor : (Burt. Comp. pl. 342-344.)

Q.—Devise of land to the use of A. for life, with remainder to the use of B. and his heirs in trust for the heirs of A. ; does A. take any, and if any, what estate beyond an estate for life ?

A.—No ; the life estate being legal, and the remainder equitable, the rule in *Shelley's case* does not apply. A. takes an estate for life only, and his heirs will take as purchasers : (see Fearne's Contingent Remainders, chap. 11, sect. 5, par. 10.)

Q.—A. contracts to hold Blackacre to the use of B. to the use of C. What is the effect of such a limitation, and what are the respective interests of B. and C. resulting therefrom ?

A.—If A. merely contracts to hold Blackacre to the use of B., to the use of C., A. will retain the legal estate ; B. therefore will take nothing under the contract, and C. will have an equitable interest. For the mere *contract* of A. does not divest him of the legal estate, an absolute conveyance—a deed—being required for that purpose : (see Will. R. P. 189, 13th edit.) If, however, this contract is by *deed*, in which case it may be construed as a covenant to stand seised, or, if enrolled, a bargain and sale, according to the consideration for the deed, then B. would take the legal and C. the equitable estate : (see Burt. Comp. pl. 145.)

Q.—Give the form of expression by which, in one instrument, a legal estate in fee simple and an equitable estate in fee simple respectively may be conferred in the same land.

A.—If land be conveyed by grant to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs, here B. takes the legal and C. the equitable estate in the land by the same instrument : (Will. R. P. 163, 13th edit.)

Q.—What is the difference between a conveyance of land to A. in trust for B. and a conveyance to A. to the use of B. ?

A.—There is no difference ; B. takes the legal and equitable estate in each case. The words "to the use" are now universally employed ; but "upon trust" or "confidence" would answer as well, as they are mentioned in the Statute of Uses : (Will. R. P. 161, 13th edit.)

Q.—What is a power appendant ?

A.—A power strictly appendant is where the use or estate to be created by the power takes effect in possession during the continuance of the estate, which is limited to the donee of the power, and therefore wholly or partially overreaches that estate ; as in the instance of the power usually reserved in settlements to tenants for life to make leases : (1 Sug. Pow. 44.

5th edit. ; Burt. Comp. pl. 177, &c. ; *Edwards v. Slater*, L. C. Conv. 283, 285, in notes.)

*Q.*—What are powers in gross ?

*A.*—Powers in gross are where the person in whom they are vested has an estate in the lands, but the estate to be created under the power is not to take effect until his estate is determined : such is the power of jointuring commonly inserted in marriage settlements : (1 Sug. *ubi sup.* ; Burt. Comp. pl. 180 ; *Edwards v. Slater, sup.*) (*a*)

*Q.*—Distinguish between powers of appointment general and special, appendant, and in gross. How must a will be executed to operate as an exercise of a “power,” and what “power” will a general devise include ?

*A.*—A general power of appointment is a power to appoint to any one, while a special power is to appoint amongst a particular class, as children ; a power appendant is where the use or estate to be created by the power takes effect in possession during the continuance of the estate, which is limited to the donee of the power, and therefore wholly or partially overreaches that estate. A power in gross is where the person in whom it is vested has an estate in the lands, but the estate to be created under the power is not to take effect until his estate has determined : (see *supra.*) A will to operate as an exercise of a “power” only requires to be executed as wills usually are, and with no additional formality, and a general devise will include all property which the testator had a general power to appoint, unless a contrary intention appears : (1 Vict. c. 26.)

*Q.*—If a person having simply a power of appointment over land, and no estate, executes a deed purporting to convey the land as if he were seised of the estate, would the conveyance vest the property in the grantee ?

*A.*—The grantee will take the fee if the conveyance is attended with the formalities required to the execution of the power as to subscriptions, witnesses, &c., for the donee may exercise his power without actually referring to it : (*Sir E. Clere's case*, 6th Rep. 17 b ; 1 Sug. Pow. 356, 357, 7th edit.)

*Q.*—Under his marriage settlement A. has a life interest in a sum of 10,000*l.*, with an absolute power of appointment over it by will. In the year 1876 he executes a will, giving all his property to B., but without specially referring to the settlement or the 10,000*l.*, and then dies. Does or does not B. take the 10,000*l.* ? Give your reasons.

*A.*—B. will take the 10,000*l.*, as a will to operate as an exercise of a “power” only requires to be executed as wills usually are, and with no additional formality ; and a general bequest will include any personal estate over which the testator had a general power to appoint, unless a contrary intention appears : (1 Vict. c. 26, s. 27.)

*Q.*—A., under a power, appoints a fee-simple estate to B. and his heirs, to the use of C. and his heirs. What estates, legal and equitable, do B. and C. respectively take ?

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(*a*) Another kind of power in gross is that which a person who conveys away all his estate at the same time expressly reserves to himself over the use : (Burt. Comp. 181 ; Sug. Pow. 44, 6th edit.)

A.—A power does not operate as a conveyance of the possession of the estate, but like a bargain and sale, as a limitation of a use ; therefore B. takes the legal estate, and the use to C. being a use upon a use, which is not executed or turned into a legal estate by the Statute of Uses, gives C. the equitable estate : (Will. R. P. 296, 13th edit. ; 1 St. C. 549, 8th edit.)

Q.—A fee-simple estate is conveyed to such uses as A. shall appoint ; A., in execution of his power, appoints to B. and his heirs, to the use of C. and his heirs, in trust for D. and his heirs. In whom is the legal estate ?

A.—In this case B. takes the legal estate, but he holds it in trust, not for C. (who takes nothing), but for D. and his heirs : (Co. Lit. 271 b, note ; 1 St. C. *ubi sup.* ; Will. *ubi sup.*)

Q.—If A. (seised to uses to bar dower) appoints the fee to B. to the use of C., D., and E., would the estates of C., D., and E. be legal or equitable ?

A.—The estates of C., D., and E. would be equitable, for the reasons before stated : (see Will. R. P. 298, 13th edit. ; 1 St. C. 549, 8th edit.)

Q.—A fee-simple estate is conveyed to C. to such uses as A. shall appoint. A. sells to B. and exercises the power by conveying the estate to C. (as trustee for B.) and his heirs, to the use of B. and his heirs ; in whom does the legal estate vest ?

A.—The legal estate is vested in C. by virtue of the original conveyance to him for the reasons stated *supra*.

Q.—How does an appointment under a power in a conveyance or settlement affect the estate, and the conveyance or settlement of it ?

A.—If a power is given to a man and an estate is limited in default of its being exercised, immediately upon the execution thereof the estate limited in default ceases and is defeated ; and it cannot be conveyed or settled, except subject to the power : (2 Sug. Pow. 20, 30, 7th edit.)

Q.—Lands stand limited to such uses as A. shall by deed appoint, and in default of appointment to the use of A. in fee ; A., in pursuance of his power, appoints, and by way of further assurance conveys to B. and C. and their heirs to uses. Are the uses executed by the Statute of Uses, or do they take effect in equity only ?

A.—If the power is valid and subsisting at the time of the appointment the subsequent conveyance is, of course, inoperative, and the uses will take effect in equity only ; but if the power should by any means have been suspended or extinguished before its attempted execution, then the conveyance takes effect and the uses are turned into possession : (see Will. R. P. 304, 13th edit.)

Q.—Land is limited to such uses as A., a married woman, may appoint, and in default of appointment to A. for life, with remainder to her first and other sons in tail male. A.'s eldest son is of age. Who are necessary parties to an instrument for effectually vesting the land in a purchaser ?

A.—A. can appoint the fee to the purchaser without the concurrence of her husband, but, should the purchaser require further assurance, unless



the case is within 45 & 46 Vict. c. 75, A. must assign her life interest, her husband must join in the deed, and she must be separately examined, and the deed acknowledged as required by 3 & 4 Will. 4, c. 74. The son A. must also join in the deed to bar his estate tail, which must be enrolled in Chancery within six months of execution, and A. and her husband must consent as protectors.

*Q.*—When a power is executed by will, at what point of time does it take effect; and would there be any difference in this respect if the power were executed by deed with a power of revocation to the appointor?

*A.*—In the case of a will the appointee only takes from the death of the party executing it (7 Will. 4 & 1 Vict. c. 26, s. 24); but in case of a deed he takes from the time of execution, subject to revocation during the life of the donor.

*Q.*—Where a power of appointment over real estate is executed, from whom does the appointee immediately take in point of estate, viz., the party creating the power or the party executing it? And state the reason.

*A.*—The appointee takes from the party creating, and not from the party executing the power, because no estate, but a use only, is passed from the party executing the power, and estates created by the execution of a power take effect in precisely the same manner as if created by the deed which raised the power: (1 St. C. 549, 8th edit.)

*Q.*—State in general terms the rule for determining how far a power is suspended or extinguished by any act of the donee of the power having also an interest in the estate, affecting that interest; could such donee, after creating a charge on his estate, exercise a power in any way defeating such charge?

*A.*—If the donee of a power appendant (the case put) deals with the property to which the power is so appendant in such a way that the exercise of the power would be inconsistent with such dealing, the power is either suspended or extinguished according to the extent of the dealing: (see *Edwards v. Slater*, L. C. Conv. 277.) It follows from this, that the donee, after creating a charge on his estate, could not, by exercising his power, defeat such charge: (*Goodright v. Cator*, Doug. 460; 1 Sug. Pow. 50, 51, 6th edit.; Burt. Comp. pl. 176.)

*Q.*—If a tenant for life with power of leasing were to alienate his whole life interest, would that power be extinguished? Would a power in gross, that is, a power given to a person who has an interest, but not to take effect out of that interest, be extinguished by alienation of that interest?

*A.*—If the tenant for life having such a power (which is a power appendant) convey away his own life estate, the power is gone: it is no longer possible for the donee to execute it, inasmuch as it would be derogatory to his own grant: (see notes to *Edwards v. Slater*, L. C. Conv. 289; 1 Sug. Pow. 57, 6th edit.) But with respect to a power in gross, it is otherwise; for the conveyance of his estate by the donee of such a power would not extinguish the power: (Burt. Comp. pl. 180; 1 Sug. Pow. 82, 6th edit.)



**Q.**—What estates are defeated or overreached by the exercise of powers?

**A.**—The exercise of a power will defeat estates limited under the instrument by which the power is given, in default of and subject to the exercise of such power. And see preceding answers.

**Q.**—A tenant for life, with a power of leasing, mortgages his estate; how far is he thereby restrained from exercising his power? May or may not stipulations be made in the mortgage deed for the exercise of such power, and what would in ordinary cases be proper?

**A.**—The tenant for life may, it seems, still exercise his power; for, subject to the charge, the rent and profits belong to him, and the lease cannot prejudice the security, as the best rent must be reserved: (*Ben v. Bulkley*, Doug. 292.) However, a learned writer thinks, notwithstanding this case, that it is not safe to dispense with a clause in the mortgage deed empowering the tenant for life to grant leases with the consent of the mortgagee, for the power cannot be exercised to the *prejudice* of the mortgagee: (1 Sug. Pow. 58, 65, 67, 6th edit.)

**Q.**—Trustees under a settlement of real estate have a power of sale with the consent of the tenant for life. The tenant for life incumbers his life estate. Can he afterwards consent to a sale?

**A.**—Yes; subject to the incumbrance, for reasons similar to those given in the preceding answer: (Sug. Pow. 62, &c., 7th edit.)

**Q.**—What is the difference as regards the rule against perpetuities between a general and a special power?

**A.**—The difference is this: General powers have no tendency to a perpetuity, as the time for vesting is reckoned from the *execution* of the power, and not from its creation. Special powers have such a tendency, for the time of vesting runs from the instrument *creating* the power. Therefore, in the latter case, no estate can be created which would not have been valid if limited in the instrument creating the power: (1 Sug. Pow. 472, 475, 7th edit.; Burt. Comp. pl. 787.)

**Q.**—If an estate is limited to A. for life with power to grant leases for twenty-one years, and A. conveys all his estate, right, and interest to B., can B. exercise the power?

**A.**—A. cannot delegate his power to B., as the maxim *Delegatus non potest delegare* applies; unless, indeed, the power was originally authorised to be executed by A. and his *assigns*; for in such case it is said that the power will pass to any person who has the estate: (see 1 Sug. Pow. 221-223, 6th edit.)

**Q.**—What is the effect of a lease of two farms at an entire rent, one of which belongs to the lessor in fee, and the other is subject to his power of leasing?

**A.**—Such a lease would on the death of the lessor be invalid against the remainderman as to the farm over which he has only a power of leasing; because it could not be ascertained that a proper amount of rent had been reserved for this farm. Yet an apportionment will be made of the rent as to the land in fee, the lease as to which is good: (1 Sug. Pow. 421, 426, 7th edit.)

## CONTRACTS AND CONDITIONS OF SALE.

*Question.*—What are the requisites to make a contract valid by the Statute of Frauds, and are there any exceptions recognised in equity?

*Answer.*—The 4th section of the Statute of Frauds enacts that no action shall be brought upon any contract respecting lands, &c., unless such contract be in writing signed by the party to be charged therewith, or his authorised agent : (29 Car. 2, c. 3, s. 4.) But equity, notwithstanding the 4th section, will decree specific performance of a parol contract concerning lands—1. Where the agreement is fully set out in the claim, and admitted by the defence of the defendant, and he does not insist on the statute as a bar ; 2. Where it was prevented from being reduced into writing by fraud ; 3. Where there has been a part performance : (St. Eq. § 764, &c.)

*Q.*—What is the effect of a contract for sale of a freehold estate?

*A.*—The effect of a valid contract amounts to an equitable conversion of the land into money, and the money into land; and either the vendor or purchaser or their representatives may bring an action thereon in case of breach by the other, and obtain damages ; or he may enforce specific performance in the Chancery Division with damages : (Sug. Conc. V. 122.)

*Q.*—After contract signed, and before the time fixed for the completion of the purchase, who, as between vendor and purchaser, and in the absence of any stipulation on the subject in the contract, is entitled to the crops and ordinary profits of the land at maturity? Does the same rule apply after the day fixed for completion and before the purchase is actually completed?

*A.*—Up to the time fixed for completion the vendor is, in the absence of special stipulation, entitled to the crops or other ordinary profits of the land ; he would not, however, it is conceived, be entitled to take crops in an immature state, or otherwise than in due course of husbandry. After the time fixed for completion and pending negotiation, he may, it appears, in due course of husbandry, cut coppice and get in crops, but the net profits will belong to the purchaser. Where the contract was for the purchase of an estate, including the growing crops, to be completed and possession given on the 24th June, and the time was extended by consent till the 29th September, and the vendor in the interval sold the crops, the purchaser was held entitled in equity only to the crops growing at the time of the actual completion, and was left to his remedy (if any) at law for the recovery of the produce of the crops.

Everything, however, which forms part of the inheritance, belongs to the purchaser from the date of the contract, so that he is entitled to windfalls and to the produce of ordinary timber cut, or, it is conceived, stone or gravel quarried or dug by the vendor after the contract : (Dart's V. & P. 247, 248, 5th edit.)

*Q.*—What parol agreements giving an interest in land are valid within the Statute of Frauds? And state generally what acts constitute such part performance as would induce the court to enforce an agreement notwithstanding the statute.

*A.*—A lease not exceeding three years from the making, and where a

rent of two-thirds of the value is reserved, is binding, although by parol. But an *agreement* for a lease for less than three years is not: (see *Ld. St. Leonards' Handy Book*, 103, 6th edit.)

As to what acts constitute a part performance of a verbal agreement, they should be such as are clearly and exclusively referable to a complete agreement, and must have been done with no other view than to perform such agreement; such as letting the purchaser into possession: (*St. Eq. § 764, &c.*)

*Q.*—State the date and some of the provisions of the Statute of Frauds.

*A.*—The Statute of Frauds (29 Car. 2, c. 3) was passed in the year 1677. As to its provisions, see *ante*, pp. 9, 19, 45.

*Q.*—Must an agreement be sealed, or may it only be signed agreeably to the Statute of Frauds?

*A.*—An agreement need not be sealed; the Statute of Frauds only requires it to be signed: (*Hughes' Pract. Sales*, 75, 87, 2nd edit.)

*Q.*—Is it the duty of the vendor's solicitor to investigate the title of his client before he prepares the contract or conditions of sale? And if he does so, what advantages result to his client from so doing?

*A.*—It is the duty of the solicitor so to investigate the vendor's title; for otherwise the client might be contracting to sell property to which he has a defective title. The conditions being prepared to meet the state of the title prevents the purchaser raising objections thereto: (see *Hughes' Conv.* 10, 71, &c.)

*Q.*—State the principal points to be provided for on sale by auction of (1) freehold estates; (2) leasehold; (3) copyhold.

*A.*—(1) *In case of freeholds and leaseholds*, the following must be provided for:

1. That the highest bidder shall be the purchaser (subject to the right of the vendor or his agent to bid) (*a*), and in case of dispute that the lot be put up again at the last undisputed bidding.

2. For payment of deposit and completion of purchase.

3. That in case of delay by purchaser he shall pay interest.

4. For delivery of abstract of title, at vendor's expense, within specified period.

5. For delivery of requisitions on the title by the purchaser within a specified period, and that subject to such requisitions the title shall be deemed to be accepted.

6. If purchaser objects to title, vendor to be at liberty to rescind the contract on return of deposit without interest or costs.

7. Error in description not to annul sale, but to be made good by compensation.

8. For empowering vendor to resell in case of default by purchaser, and deposit to be forfeited, and loss on resale to be recovered as liquidated damages.

Stipulations will in most cases be necessary as to title, title-deeds, &c.,

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(*a*) As to this part of the condition, see the important case of *Mortimer v. Bell* (13 L. T. Rep. N. S. 849), and 80 & 81 Vict. c. 48, *et post*.

the payment for timber, fixtures, &c.: (see 1 Prid. Conv. 22, 29 *et seq.*, 9th edit.; and see 37 & 38 Vict. c. 78.)

(2) *In case of copyholds*, the vendor should be particular about negating his liability to identify the premises, as when they are intermixed with freeholds it is found sometimes impossible to do this. It should also appear on the particulars that the property is copyhold. (a)

(a) In sales made after 31st Dec. 1881, unless otherwise expressed in the contract of sale, the following conditions apply by 44 & 45 Vict. c. 41, s. 3:—

(1.) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion.

(2.) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement.

(3.) A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals contained in the abstracted instruments of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected if and as required, by fine, recovery, acknowledgment, enrolment, or otherwise.

(4.) When land sold is held by lease (not including underlease) the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and on production of the receipt for the last payment due for rent under the lease before the date of the actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase.

(5.) When land sold is held by underlease, the purchaser shall assume, unless the contrary appears, that the underlease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the underlease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the underlease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date.

(6.) On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences and information not in the vendor's possession and all attested, stamped, office, or other copies or extracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring making or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser.

(7.) On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense.

**Q.**—Give the heads of such clauses, formerly inserted in conditions of sale of freeholds in several lots, as are rendered unnecessary by the Vendors and Purchasers Act, 1874, and the Conveyancing Act, 1881.

**A.**—The following will be rendered unnecessary :

1. That the purchaser of more than one lot shall be entitled to one abstract only : (Conv. Act, s. 3 (6).)

2. That recitals, &c., contained in documents twenty years old shall be deemed conclusive evidence of the matters stated therein : (V. & P. Act, s. 2.)

3. Production of deeds, proving attested copies, &c., not in vendor's possession, to be at expense of purchaser : (Conv. Act, s. 3.)

4. If all the lots are not sold, muniments to be retained by vendor : (V. & P. Act, s. 2.)

5. Covenants for production to be at expense of purchaser : (*Ib.*, s. 2.)

6. Purchaser not to require production or abstract of documents prior to stipulated commencement of title : (Conv. Act, s. 3.)

**Q.**—On a sale of real estate by auction, what conditions as to title, title-deeds, and otherwise, ought to be inserted to anticipate difficulties on the part of an unwilling purchaser ?

**A.**—Conditions that vendor shall not be bound to show a title beyond a specified date ; that in case the purchaser or his solicitor shall object to the title, the vendor shall be at liberty to vacate the sale and repay the deposit, but without interest, &c. ; that the purchaser shall bear the expense of any covenant to produce ; that any misdescription shall not annul the sale, but be made good by compensation : (see 1 Hughes' Pract. Sales, 10 *et seq.*, 2nd edit.)

**Q.**—Upon a sale by auction, in lots, of freehold property, the whole of which is let on lease, at an entire rent, what provision should be made by the conditions of sale for the apportionment of such rent between the purchasers ?

**A.**—Provision must be made by the conditions for the apportionment of the rent, and if the tenant's concurrence in the apportionment cannot be obtained, the purchaser should be precluded from taking any objection on that account : (1 Prid. p. 29.)

**Q.**—State, shortly, the usual conditions of sale by trustees of a leasehold house.

**A.**—When a sale is made by trustees, they should be careful to enter into no condition which the state of the title does not require. Still strict conditions, though somewhat unusual, will not be considered a breach of trust : (Sug. Conc. V. 45.) The conditions should state that the vendors are trustees, and that the purchaser should not require them to enter into any covenant. Then should follow the usual conditions of sale : (See *ante*, p. 288.)

**Q.**—Acting as solicitor for a person about to sell an estate, would you take any, and what, preliminary measures regarding the title or conditions of sale ?

**A.**—Before proper conditions of sale can be framed, the value of the property should be ascertained, and the title to it must be investigated : (see 1 Hughes' Pract. Sales, 3, 2nd edit.)

**Q.**—If a client informed you that he was in treaty for sale of his freehold estate, what caution would you give him, and why?

**A.**—I should advise him to sign no contract without its being first approved by me, in order that the title might be properly investigated and special conditions inserted to meet any defects therein, and thus prevent his liability to render a forty years' title.

**Q.**—In conditions of sale of estates it is often provided that, if from any cause whatever the completion shall be delayed after the day named, the purchaser is to pay interest from that time until the day of completing the sale. Can this condition be enforced without qualification. And if not, why not?

**A.**—The rule on this point is this: When the delays are occasioned by defects of the title, but not by the wilful default or vexatious conduct on the part of the vendor, the purchaser will have to pay interest from the day fixed for completion, and not from the time when a good title was first shown, although he is not in fault: (see *Des Visme v. Des Visme*, 1 Mac. & Gor. 336; *Sherwin v. Shakespeare*, 24 L. T. Rep. 45; *Williams v. Glenton*, 13 Ib. N. S. 727, L.JJ.)

**Q.**—How far is a purchaser liable to be seriously affected by a condition providing that no compensation shall be allowed by the vendor in case of misdescription?

**A.**—Such a condition will only protect the vendor against slight errors in description of quantity, but it is now settled that a purchaser will not be compelled specifically to perform his agreement, even with an abatement in the price, unless he gets substantially what he bargained for: (Deane's Conveyancing, 2nd edit., 331.)

**Q.**—When an owner has verbally agreed to sell land, and instructs his solicitor to prepare a written agreement, what are the duties of the solicitor anterior to the signing of the contract by the client?

**A.**—The solicitor, before preparing the written agreement, should examine the title to the land and prepare the written contract to meet the state of that title, and not allow his client to enter into an agreement which he cannot carry out. He should also see that the client has not been hurried into the agreement, or imposed upon in any way.

**Q.**—A client instructs you to sell his landed estate by auction. Describe shortly the steps you would take to carry out his instructions.

**A.**—I should first prepare the abstract and investigate my client's title. Then prepare conditions of sale to meet any difficulties that the purchaser might make with regard to such title. Settle the particulars and reserve bid with the auctioneer, and see that the sale was properly advertised. Then attend the sale, and be careful that the purchaser signed a proper contract at the foot of the conditions of sale, and paid the deposit. Deliver the abstract of title within the time specified; answer the requisitions; produce the deeds for examination: peruse the draft conveyance, and approve same. Get the deed properly executed, and attend completion of the purchase, and hand over deeds on payment of purchase money.

**Q.**—Under what circumstances should land-tax and tithe be referred to in particulars of sale?



A.—There is no need to refer to them, unless the land tax has been redeemed, or there are special circumstances connected with the tithe: (Dart's V. & P., 5th edit., p. 352.)

Q.—Can the printed particulars and conditions of sale of an estate by auction be varied by parol at the sale?

A.—No; neither by adding to, subtracting from, or contradicting anything contained in them; but they can of course be altered by writing, in which case care should be taken that the contract is signed on the altered conditions: (see Sug. Conc. V. 12, 113.)

Q.—On the sale of an estate by auction, is it necessary to have an agreement in writing for the sale and purchase?

A.—Yes; sales by auction of estates are within the Statute of Frauds, and consequently, the contract could not be enforced against either of the parties who had not signed an agreement. The auctioneer may, however, bind the seller or purchaser by signing for him, being in law his agent for that purpose: (Sug. Conc. V. 28.)

Q.—How are the requisitions of the Statute of Frauds complied with at an auction as usually conducted?

A.—By a short memorandum or agreement placed at the end of the conditions of sale, signed by the purchaser. Frequently the auctioneer does not offer to sign a reciprocal agreement as the agent of the seller; therefore the purchaser should before signing require this to be done: (see *Ld. St. Leonards' Handy Book*, 33, 6th edit.)

Q.—What matters are important to be attended to and provided for in framing a contract for the sale and purchase of a freehold or leasehold estate?

A.—The same particulars as detailed in framing conditions; of course varied to meet the different mode of sale. The terms of the contract should be clearly and explicitly set forth; every care should be taken to avoid equivocal expressions, and nothing which it is intended to carry into effect should be left resting merely on parol, as extrinsic evidence is inadmissible in a court of law to vary the terms of a written contract, and it is only under peculiar circumstances that such evidence will be received in a court of equity: (see *supra*.)

Q.—Can a bidder at a public auction retract his bidding, and, if so, when?

A.—A bidding may be retracted at any time before the lot is actually knocked down; it should be made in a tone sufficiently loud for the auctioneer to hear: (see *Ld. St. Leonards' Handy Book*, 35, 7th edit.)

Q.—What is the rule as to a vendor employing one or more persons to bid for him at a sale by auction, where a right to bid is not by the conditions expressly reserved to the vendor? Does this rule vary at law and in equity?

A.—Formerly, if no right of bidding was reserved to the owner of the property by the conditions, and he nevertheless employed one person to bid for him, the sale was void at law; courts of equity, however, generally allowed one puffer, but not two: (*Mortimer v. Bell*, 13 L. T. Rep. N. S. 348.) Now, however, sales of land by auction, void at law by reason of



the employment of a puffer, are to be void in equity also; and the conditions of sale of land by auction must state whether the land is sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; and if it is stated that such land will be sold without reserve, it is illegal to appoint a puffer: (30 & 31 Vict. c. 48, ss. 4, 5.)

### VENDOR AND PURCHASER.

*Question.*—Lands may be acquired by descent or by purchase. By what other modes (if any) may land be acquired?

*Answer.*—It is said these two terms include every mode of acquiring lands; for purchase includes in its scope title by occupancy, conveyance, devise, forfeiture, partition, elegit, bankruptcy, and inclosure; and descent includes not only where the property is cast upon the heir on intestacy, but also escheat, dower, and curtesy. However, it is difficult to say whether descent, strictly speaking, includes escheat, dower, and curtesy; or purchase, inclosure, elegit, and bankruptcy. The more comprehensive titles are, by the act of law and by the act of the party: (see 1 St. O. c. 10.)

*Q.*—What is the distinction between a title by purchase and a title by descent?

*A.*—A person is said to acquire his title by descent when it comes to him by operation of law, as where it descends to the eldest son on the death of the father. If it is acquired in any other manner it is to be acquired by purchase, as where it is devised by will: (Will. R. P. 101, 13th edit.)

*Q.*—What is the rule of succession to real and personal property? Is the first governed by the domicil of the last owner, or by the law of the country where the property is situate, and is the second affected by it not being within the four seas?

*A.*—The succession to both real and personal property is governed by statute, the 3 & 4 Will. 4, c. 106, as to real property, and the 22 & 23 Car. 2, c. 10, as to personal property. The first is governed by the law of the country where the property is situate, the second by the domicil of the last owner.

*Q.*—What is the difference of construction between a deed and a will; and why is the difference made?

*A.*—Wills are construed more liberally than deeds: because in the exposition of the former, the law has rather inclined to regard the intention of the testator than the precise legal import of the terms used; wills being so often made when a testator is suffering from sickness, and frequently when on his deathbed, and unable to obtain that professional assistance of which a party to a deed may generally avail himself. And where two clauses are inconsistent in a will the latter prevails, in a deed the former: (see 1 Hughes' Pract. Sales, 303, 2nd edit.)

*Q.*—Who is capable of conveying real estate; and who, in the technical sense of the term, of purchasing?

**A.**—All persons of full age, sound mind, not being convicts (see Felony Act, 33 & 34 Vict. c. 23), may alien their lands. So may a *feme covert*, if her husband join with her, or without, if dispensed with; so, lay corporations aggregate (except municipal corporations) may alien, but ecclesiastical corporations, whether aggregate or sole, have only a limited power of disposition. All persons and even corporations may be purchasers of lands, but some of these are partially, and others wholly, incapable of holding the same for their own benefit: (1 Hughes' Pract. Sales, 157, 2nd edit.; 1 St. C. ch. 15.)

**Q.**—Can an alien hold any real or personal estate in England; and what is the effect of a conveyance to him of an estate in fee?

**A.**—Formerly an alien could not, even though the subject of a friendly state, hold real estate here unless it was merely a lease for residence or business for a term not exceeding twenty-one years. The conveyance to him of a greater estate in lands was a forfeiture to the Crown, who after office found might have seised the lands. He might, however, have possessed personal property in this country: (Will. R. P. 65, 13th edit.) But now, by the Naturalization Act, 1870 (33 Vict. c. 14, s. 3), it is provided that real and personal property of every description, except a share in a ship, may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural-born British subject.

**Q.**—Can municipal corporations by their own, or what, authority absolutely dispose of their lands?

**A.**—Before municipal corporations can absolutely dispose of their lands they must obtain the consent of the Lords of the Treasury, or any two of them who are made parties to the conveyance: (5 & 6 Will. 4, c. 76, s. 94; 6 & 7 Will. 4, c. 104, s. 2; 1 St. C. 471, 8th edit.)

**Q.**—Are there any, and what, means by which a charity constituted by Act of Parliament, but not having under its Act power to purchase land, can be enabled to purchase land for the purposes of the charity; and is it necessary that such charity should be legally authorised to hold land? What are the Acts governing the law on the subject?

**A.**—By 16 & 17 Vict. c. 137, s. 27, amended by 18 & 19 Vict. c. 124, s. 41, any charity may purchase land required for the erection or construction of any house or building, with or without garden, playground, or other appurtenants, for the purposes of the charity, without licence in mortmain.

**Q.**—A. gives land for building thereon the church of a new parish to be constituted under the Church Building Acts. To whom is the title to be conveyed? State concisely the proceedings relating to the conveyance.

**A.**—The land is, in the first instance, conveyed either to the Ecclesiastical Commissioners, or as they shall direct, the freehold ultimately being vested in the incumbent. Only as much land as is necessary for the church and churchyard is to be conveyed. Formerly, if the endow-

ment exceeded in value 300*l.* annually, the provisions of the Mortmain Acts applied; but it seems this is no longer so. Whether the deed requires enrolment, however, is by no means clear: (see Trail's New Parish Acts, 76, 82, &c.; *Champneys* (clerk) v. *Arrowsmith* (clerk), L. Rep. 3 O. P. 107.)(a)

**Q.**—A. gives land for building thereon a school, to be in union with the National Society for promoting the Education of the Poor according to the Principles of the Church of England, who promise a grant towards the building. To whom is the conveyance to be made? and state generally its form and the mode of proceeding.

**A.**—The conveyance is usually made to the clergyman of the parish and the churchwardens and their successors. The conveyance, which is by deed poll, contains provisions for the management of the school. Its execution must be attested by one witness, and it formerly required enrolment, but was not avoided by the death of the grantor within twelve months after execution. By the 31 & 32 Vict. c. 44, all conveyances, &c., of land, except by will *bonâ fide* made after the passing of that Act, to trustees for the promotion of education, &c., are exempt from the provisions of the Mortmain Acts, provided that such conveyances, &c., were really and *bonâ fide* made for a full and valuable consideration actually paid upon or before the making of such conveyances, &c., without fraud or collusion, and provided that each piece of land does not exceed two acres: (Burt. Com. 70, note b, 7th edit., and see a form in David. Conv.)

**Q.**—How is the compensation for land taken from persons under disability under the provisions of 8 Vict. c. 18 (the Lands Clauses Act) assessed, and how may the money be invested?

**A.**—It is assessed by two surveyors, one nominated by the promoters of the undertaking and the other by the other party, and if they cannot agree, by a third surveyor appointed by the Board of Trade on the application of either party after notice to the other: (sect. 9.) The money is to be paid into the Bank of England, and until it can be applied (1) in redemption of the land-tax; or (2) in paying off incumbrances on lands settled to the same uses as the land sold; or (3) in the purchase of other lands to be settled to the same uses as the land sold; or (4) if paid in under that Act as the court directs; or (5) in payment to the person absolutely entitled, it may be invested in the Three Per Cent. Consolidated or Reduced Annuities, or in Government or real securities: (sect. 70.)

**Q.**—State shortly the terms on which a railway company can obtain possession of land required for the purposes of their undertaking, before the amount of purchase money or compensation has been ascertained.

**A.**—They must deposit in the Bank of England either the amount claimed or such a sum as may be fixed by a surveyor appointed by the Board of Trade, and also give a bond with two sureties (to be approved by the Board of Trade if the parties differ) in a penal sum equal to the amount to be deposited, and upon such deposit being made and bond

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(a) See 58 Geo. 3, c. 45; 59 Geo. 3, c. 134; 3 & 4 Vict. c. 60; 6 & 7 Vict. c. 87; 7 & 8 Vict. cc. 56, 94; 8 & 9 Vict. c. 70; 14 & 15 Vict. c. 97; 19 & 20 Vict. cc. 55, 104; 23 & 24 Vict. c. 124.

delivered or tendered to non-consenting party the company may enter: (8 Vict. c. 18, s. 85; 30 & 31 Vict. c. 127, s. 36.)

**Q.**—What parties are enabled to convey by the Lands Clauses Act?

**A.**—All parties seised or entitled may convey, and particularly corporations, tenants in tail or for life, married women, guardians, committees of lunatics, trustees for charitable or other purposes, executors and administrators, and all persons entitled to the receipt of the rents and profits of such lands in possession, or subject to any estate in dower, for life or years: (see sect. 7.)

**Q.**—B., tenant for life, with remainder to C. (then under twenty-one), tenant in tail, sells to a railway company, and the purchase money is paid into court under the Lands Clauses Act, and vested in Three per Cents. B. then dies, and C., having attained twenty-one, desires to get the Three per Cents. sold, and the money paid to him for his own use. Can he do this, and how?

**A.**—C. must first execute an assignment of the Three per Cents. by way of disentailing assurance, and enrol it in Chancery within six months of execution, after which he may petition the court for sale and payment of the funds to him.

**Q.**—A railway company takes, under the Lands Clauses Act, land of which A. is seised in fee, A. dies after the amount of the compensation is settled, but before it is paid. Who is entitled to the purchase money? And why?

**A.**—A conversion takes place (unless the owner be a lunatic or under any other incapacity), and the purchase money will therefore be payable to the personal representatives of A. (*Dart's V. & P.*, 5th edit. 258.)

**Q.**—State the course of practice to be observed on sales of land if concerned (1) for vendor, (2) for purchaser.

**A.**—The vendor's solicitors should first prepare a complete abstract; then settle the conditions of sale, laying the same before counsel if necessary; after which he should instruct an auctioneer and settle the particulars with him; after which the particulars and conditions are printed, with the contract of sale endorsed; after sale the solicitor should see that the contract is properly signed and stamped, and should forward abstract to the purchaser or his solicitor, who, after examining it with the deeds, sends in requisitions on the title. These are answered by the vendor's solicitor, after which purchaser's solicitor prepares draft conveyance, and forwards it to vendor's solicitor for approval; after which it is engrossed by purchaser and forwarded to vendor's solicitor for examination; an appointment to complete at the vendor's solicitor's office is then made. The purchaser makes the usual searches.

On payment of the balance of the purchase money, the vendor's solicitor hands over the deeds, and either gives possession of the property, or an authority to the tenants to pay the rent to the purchaser, and the latter signs an authority to the auctioneer to pay over the balance of the deposit to the vendor.

**Q.**—What are the principal enactments in the Vendor and Purchaser

Act, 1874, with regard to (1) contracts for sale of land ; (2) the reconveyance of mortgaged estates ; and (3) requisitions on title ?

A.—(1) Forty years' title is substituted for sixty, in absence of condition to the contrary.

First. Under a contract to grant or assign a term of years, the intended lessee or assign shall not be entitled to call for the title to the freehold.

Second. Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations twenty years old at the date of the contract, shall, unless proved inaccurate, be taken as sufficient.

Third. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall be no objection to the title if the purchaser on completion will have an equitable right to their production.

Fourth. Covenants for production to be furnished at the purchaser's expense, the vendor bearing the expense of perusal and execution on behalf of and by himself and necessary parties, other than the purchaser.

Fifth. The vendor shall retain any documents of title relating to any part of the estate retained by him.

(2) By sect. 4 the legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee shall have been admitted, may on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate.

(3) A vendor or purchaser of real or leasehold estate in England may apply by summons at chambers (in Chancery) in respect of any requisitions or objections, or any claim for compensation arising out of the contract, and the judge may make such order as he may think just, including the costs.

Q.—What alterations in the law were made by the Real Property Limitation Act, 1874 ? When did that Act come into operation ?

A.—The following are among the alterations made by the Act referred to :—Land to be recovered only within twelve years after right of action accrued. Provisions for case of future estates, and time limited to six years if particular estate out of possession. In cases of infancy, coverture, or lunacy, when cause of action accrues, six years to be allowed from termination of disability. No further time allowed for absence beyond seas of persons entitled to bring action. Thirty years utmost allowance for disabilities. Mortgagor to be barred at the end of twelve years from the time when the mortgagee took possession, or from last written acknowledgement. Money charged upon land and legacies to be deemed satisfied at the end of twelve years if no interest paid or acknowledgement given in writing in the meantime. The Act (which is the 37 & 38 Vict. c. 57) came into operation on January 1st, 1879.

Q.—For how many years has a purchaser of a fee-simple estate, without any conditions of sale, a right to require the vendor to show a title ? And on what principle is the vendor bound to show a title for the time to be stated in your answer to the first part of this interrogatory ?

A.—Where there are no conditions or contract of sale tying down the purchaser, he can compel the vendor to show a clear forty years' title :

(37 & 38 Vict. c. 78.) Formerly it was sixty years, the duration of human life being considered the origin of that time: (Sug. Conc. V. 265; *Cooper v. Emery*, 1 Phill. 388; Will. R. P. 449, 13th edit.)

**Q.**—On what principles would you prepare an abstract of title with a view to a sale? What are the chief points to be attended to on examining the title deeds with the abstract?

**A.**—A good title should be shown to both the legal and equitable estates, and the interests of all persons in the property should appear upon the face of the abstract, with proper pedigrees, where necessary; it is not advisable to show the full forty years' title which a purchaser can require in absence of a condition to the contrary, if a good root of title is found thirty years old, and the ordinary condition is then inserted in the conditions of sale. In examining the title deeds with the abstract, care should be taken to see that the deeds are properly stamped and executed by the parties and duly attested; that receipts previous to 1882 were properly indorsed; that the deeds are enrolled and acknowledged when required. Also that the identity of the parcels is preserved, and that all incumbrances disclosed by the deeds are duly set out in the abstract, and powers which have been exercised should be fully set out.

**Q.**—Under what circumstances would it be the right practice, when drawing an abstract of title, to set out fully a power of sale contained in an abstracted mortgage?

**A.**—Where the power of sale has been acted upon or the sale takes place under the power.

**Q.**—When your title commences with a will, what must you prove besides, and what is the usual evidence?

**A.**—If the title commences with the will of a person who died forty-six years since, then proof by old leases, declarations, receipts of rent, parish books, &c., should be supplied to show that he was in possession of the estate, or in receipt of the rents and profits at the time he made the will, and at the time of his decease: (1 Prid. Conv. 137, 9th edit.)

**Q.**—Is a forty years' title sufficient in all cases, or does it ever, and when, become necessary to go further back?

**A.**—It is not, for in deducing a title to an advowson one hundred years is required, as the presentations, which are the only fruits of the advowson, and consequently the only occasions when the title is likely to be contested, occur only at long intervals, and no action can be brought after the above period: (Will. R. P. 439, 13th edit.; *et ante*, p. 221.)

**Q.**—What instruments must be stated in an abstract of title to an advowson?

**A.**—The practice now is to carry back the title to one hundred years, and to have a list of presentations annexed to the abstract for the purpose of showing that acts of ownership have been exercised in conformity with such right of presentations, which list of presentations should be shown at the head of the abstract: (Hughes' Conv. 106.)

**Q.**—A., owner in fee simple of land in Middlesex, agrees to sell it to B., subject to a proper contract. A.'s grandfather purchased the land sixty years ago, and gave it specifically by will to A.'s father, who died in 1854



intestate, leaving A. his only son. A. brings you the conveyance to his grandfather, and the probate of his will, and instructs you to prepare, on his behalf, a proper contract. State the heads of the draft which would be required.

A.—The ordinary conditions of sale should be embodied in the contract as to payment of deposit and completion of purchase, payment of interest, &c., delivery of abstract and requisitions, and power to annul sale, &c. A special provision should be inserted that the vendor should not be obliged to prove the seisin of A.'s grandfather at the date of his will or of his decease, that purchaser should not be entitled to require registration of any document that had been omitted to be registered, and that the probate of the will should be sufficient evidence of the original; that no evidence of A.'s heirship and death of his mother should be required further than the usual certificates and statutory declarations. Error or misdescription not to annul sale.

Q.—When the contract referred to in the last question has been exchanged, what steps should be taken by the solicitors for A. and B. respectively up to the final completion of the business?

A.—A.'s solicitor delivers the abstract, which B.'s solicitor examines with the title deeds, and then peruses it and forwards requisitions on title, which A.'s solicitor then replies to. B.'s solicitor then prepares draft conveyance, which, after approval by A.'s solicitor, is engrossed and forwarded for examination, on which an appointment to complete at A.'s solicitor's office is made. B.'s solicitor makes the usual searches, including the Middlesex Registry, and attends with the money, and A. attends to execute the conveyance, or does this previously. The deeds are handed over in exchange for the money, and B.'s solicitor thereupon registers the conveyance in the Middlesex Registry.

Q.—State the requisitions which would appear necessary on the title as disclosed above.

A.—If not precluded by such a contract as we have set out above, the following would be necessary:—

1. Proof of the seisin of A.'s grandfather at date of will, and death, and his decease.
2. Death of his widow, if any.
3. Death of A.'s father intestate.
4. Heirship of A.
5. Death of A.'s father's widow, if any.
6. Production of original will of A.'s grandfather.
7. Registration of all documents affecting the title.
8. Proof of payment of succession duty on A.'s father's decease. (a)

Q.—In the absence of stipulation what evidence of A.'s heirship should B.'s solicitor require?

A.—He should require proof of the marriage of A.'s parents; this would be proved by the marriage certificate. The birth of A.; this would be proved either by the baptismal certificate or a certified extract from

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(a) The requisition as to undisclosed incumbrances has been held on appeal to be one the vendor is not bound to answer: (*Re Ford v. Hill*, 48 L. J. Rep. N. S. App. 327.)



the General Register of Births, established by 6 & 7 Will. 4, c. 86, and 1 Vict. c. 22. The death of A.'s father; this would be proved by the burial certificate, or a certified extract from the Registry of Deaths. A statutory declaration would also be required from some old person acquainted with the family, identifying the parties, and stating that A. was the eldest son of his father.

**Q.**—A. agrees to sell a leasehold estate to B. without any especial condition as to title; what title can be required?

**A.**—B. has a right to a full forty years' title if the lease itself is forty years old: (Will. R. P. 450, 13th edit.; Sug. Conc. V. 265, 267; 37 & 38 Vict. c. 78; 44 & 45 Vict. c. 41, s. 3.)

**Q.**—A. enters into an agreement to purchase a freehold house; what inquiries and advice should thereupon be made and given by his solicitor as to the insurance of the house from fire?

**A.**—He should inquire whether the house is insured against fire and in what office, and whether to a sufficient amount, as directly a binding agreement is signed the house is at the purchaser's risk. If insured, he should have inserted in the contract a provision that he shall have the benefit of the subsisting policy; if not, he should at once effect an insurance.

**Q.**—A client brings you a contract for purchase of property, consisting of houses and land. State what advice you would give him, and generally your duties to the completion of the purchase.

**A.**—I should advise him that he had done a most foolish thing in signing any contract without first consulting me upon it, and that the first thing I should do on his behalf would be to write for the abstract and inquire of the vendor's solicitor whether the houses were insured against fire, and in what office, and whether to a sufficient amount, as directly a binding agreement is signed the houses are at the purchaser's risk. If insured, I should have inserted in the contract a provision that the purchaser should have the benefit of the subsisting policy; if not, I should at once effect an insurance on his behalf. Having received the abstract, I should examine same with the title deeds, and then peruse same, and draw requisitions on title and forward to vendor's solicitors. When these were satisfied I should prepare draft conveyance and forward it for approval, which I should engross when approved, have duly stamped, and forward to vendor's solicitor for examination, and with an appointment to complete. I should then make the usual searches for incumbrances, and attend with the purchase money and hand over the same to the vendor, or his solicitor, in exchange for the conveyance duly executed and the title deeds; and if the property is in a register county, I should at once register the conveyance.

**Q.**—The vendor of a freehold house at the date of a contract for sale is the holder of a policy insuring the house against fire; the house is burnt down in the interval between the date of the contract and the time fixed for the completion of the purchase. Is the purchaser entitled as against the vendor to the benefit of the insurance, either by way of abatement of the purchase-money or reinstatement of the premises?

**A.**—If the vendor obtain the insurance money he cannot be compelled

to pay it over to the purchaser, either by way of reduction of the purchase-money or by expending it in the repair of the premises (see *Poole v. Adams*, 12 W. R. 683; and *Rayner v. Preston*, 14 Ch. Div. 297; confirmed on appeal, see L. J., N. C. April 16th, 1881.)(a)

The purchaser, on signing his contract, should always take care to have a clause added that he should be entitled to the benefit of any insurance on the premises purchased by him. In case of fire the purchaser should at once give notice to the office under 14 Geo. 3, c. 78.

**Q.**—A., having contracted to sell a farm to B., lets him into possession pending the contract; A.'s title proves defective, and the contract is abandoned; what are B.'s rights and liabilities in respect of his occupation of the farm?

**A.**—If B. takes possession, and then rejects A.'s title, he may be ejected by A., and cannot at law claim any allowance for improvements or repairs, nor will equity afford him any relief unless there has been fraud on the part of the vendor: (Dart's V. & P. 438, 5th edit.)

**Q.**—On an open contract for sale and purchase of enfranchised copyholds, is a purchaser entitled to go into the title of the lord who granted the enfranchisement; and is there any, and if so what difference in this respect between lands enfranchised under the Copyhold Acts and other lands?

**A.**—In absence of condition to the contrary, the purchaser is entitled to investigate the lord's title to the manor, as the enfranchisement combines the rights of the lord and tenant in the enfranchised land; but if the enfranchisement is carried out under the Copyhold Acts, this is made conclusive evidence of the lord's right to grant the enfranchisement: (*Kerr v. Pawson*, Rolls, 4 Jur. N. S. 425; s. c. 35 Bevan, 394.)

**Q.**—Your client, having purchased a freehold property from D., brings you the abstract deducing satisfactory title to D.'s father by conveyance to the ordinary uses to bar dower. The abstract also shows D.'s father to have died intestate in 1860, leaving D. his eldest son and heir. Assuming that the deeds had been produced, and that you were satisfied as to the death and intestacy of D.'s father and the heirship of D., what other requisition on the title would you make?

**A.**—Did D.'s father leave a widow? Is she still living, and if so, when and where was she married; and if *since* 1st January, 1834, she must concur in the conveyance to release her dower.

And if D. was an old man, a further requisition should be made as to whether he was married; and if so when and where; and if *before* 1834 his widow, if any, should join in the conveyance to release her dower.

The succession receipt for the duty payable on D.'s succession must be produced.

And the usual inquiry as to incumbrances not disclosed by abstract: (see note (a) *ante*, p. 299.)

**Q.**—If A. agrees to grant a lease of an estate to B. for a term of years at an annual rent, without any premium and without any conditions as to

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(a) But the office can recover it: (see *Castellain v. Preston*, 52 L. J., Q. B. 866.)

title in the agreement, what, if any, title may the lessee require should be shown by the lessor?

A.—The lessee (B.) cannot compel his lessor (A.) to show him any title; but on the other hand, except in the case of a bishop's lease, the lessor cannot enforce specific performance of the agreement against the intended lessee without showing a good title: (Hughes' Conv. 486; Platt, Leases, 618.)

Q.—What was the scope of the Registration of Titles Act?

A.—The scope or object of the Act was to give certainty to title to real estate and facilitate the proof thereof, and also to render the dealing with land more simple and economical. But it only enables the person named in the record of title, for the purposes of any *sale or contract for value or mortgage*, to pass an indefeasible title: (see Ayrton's Land T. Act, Intr.) Having completely failed as a practical reform, further registration under the Act was prohibited by 38 & 39 Vict. c. 87, s. 125.

Q.—Can an agent, authorised by parol to purchase an estate at a certain price, bind his principal by his written agreement to buy it for a larger sum? and if not, has the seller any, and what, remedy against the agent?

A.—An agent cannot bind his principal if he exceeds his authority; he must act within the scope of his authority and no further; if he bids more for an estate than he is authorised, he will himself become liable to the seller: (see Ld. St. Leonards' Handy Book, 24, 25, 7th edit.; Sug. Conc. V. 82.)

Q.—Is a delay occasioned by defects of title, which are ultimately removed, a bar to a decree for specific performance at the suit of the vendor; and, if not, what steps should the purchaser take to relieve himself from the contract, if the delay be injurious to him?

A.—If time be not originally of the essence of the contract, a delay on account of a defect of title which is ultimately removed will be no bar to a specific performance. But if there is unreasonable delay, the purchaser should, in order to free himself from the contract, give the vendor formal notice that unless the defects are removed within a specified time he will consider the contract rescinded; and if the vendor does not, in accordance with this notice, remove the defects from the title, the purchaser may plead it in defence to an action for specific performance: (St. Eq. §§ 747, &c., 776, &c.)

Q.—Can a contract to purchase an estate at a price to be fixed by two valuers (one to be named by each party), or an umpire to be named by the valuers if they differ in opinion, be enforced against a party who refuses to appoint, and if so, how?

A.—No; neither of the parties to such an agreement can be compelled to nominate an arbitrator or valuer under the agreement: (*Darby v. Whitaker*, 4 Drew. 134; Sug. Conc. V. 252, 204; Ld. St. Leonards' Handy Book, 47, 7th edit.)

Q.—When the conditions under which an estate is sold preclude the purchaser from objecting to the title prior to the date of a particular

document, but the purchaser in fact ascertains that the prior title is defective, can the vendor insist on the completion of the purchase?

**A.**—The court will not enforce specific performance of a contract where there is a substantial defect in the title to the whole or the principal part of the property not remediable before judgment: (Smith's Eq. Man. sec. 415.)

**Q.**—On a sale of lands, what expenses are usually borne by the vendor and what by the purchaser?

**A.**—In the absence of stipulation to the contrary, the vendor bears all the expenses incurred in making out and deducing his title to the property; of obtaining the concurrence of the necessary parties, and all the incidental costs attendant upon the *execution* of the purchase deed. But the costs of the perusal of the abstract, and its comparison with the deeds, of attested copies, certificates, declarations for verifying the title, the preparation of the purchase deed, as also of the stamp and parchment, are paid by the purchaser: (Sug. Conc. V. 172, 318, 320.)

**Q.**—A. agrees to sell a freehold house to B. for so much money, on whom, in the absence of express stipulation, do the following expenses fall?

1. Preparing the abstract of title.
2. Comparing the same with the title deeds.
3. Producing the deeds in the vendor's possession.
4. Finding and producing such deeds as are not in the vendor's possession.
5. Getting in any outstanding legal estate.
6. Preparing the conveyance.
7. Making attested copies of deeds not delivered to the purchaser.
8. Preparing covenant for production of deeds not delivered to the purchaser.

**A.**—1. Vendor. 2. Purchaser. 3. Vendor. 4. Purchaser. 5. Vendor. 6, 7, and 8. Purchaser: (37 & 38 Vict. c. 78; 44 and 45 Vict. c. 41, s. 3.)

**Q.**—On payment of purchase money to trustees, what is to be attended to on the part of the purchaser? Is the purchaser of an estate sold subject to a devise for payment of debts *generally* bound to see to the application of the purchase money?

**A.**—Formerly, if property was devised upon trust for sale and payment of specified debts or legacies, purchasers were bound to see to the application of the purchase money, unless the trustees were empowered to give receipts; but it was otherwise if devised for payment of debts and legacies *generally*: (St. Eq. §§ 126, &c.) Now, however, by the 22 & 23 Vict. c. 35, s. 23, and the 23 & 24 Vict. c. 145, s. 29, which are not, however, retrospective, the receipts in writing of any trustees for money *bonâ fide* payable to them are sufficient discharge to the persons paying the same, unless the contrary is declared by the instrument of trust. The latter section is repealed by 44 & 45 Vict. c. 41, and by sect. 36 is re-enacted and made retrospective.

**Q.**—When lands are devised charged with the payment of debts alone, or charged with debts and legacies together, or charged with legacies only,

can the devisee in either, and if in either in which, of these cases make a good title to a purchaser, or a mortgagee, without his being obliged to look to the discharge of such debts and legacies ?

A.—In the two first cases the devisee taking beneficially can sell and give a good discharge to purchasers, although the point is not free from doubt (see 2 Dart. 567-569, 4th edit.); but legatees only must join in the conveyance ; where the devisee takes as trustee for others he can sell and give a good discharge by 22 & 23 Vict. c. 35, s. 14.

Q.—A property, subject to charges by way of portions, is sold ; whose concurrence is necessary to reduce the charges ?

A.—This must depend upon the terms of the instruments creating the portions, which may and probably will have given to trustees a power to receive and give a discharge for the portions ; if so, the concurrence of the trustees is sufficient ; if not, the persons beneficially entitled to the portions must concur.

Q.—In case of sale or mortgage of reversionary funded property, what precaution should be adopted by the purchaser or mortgagee, distinguishing the case of property vested in trustees and in the Court of Chancery ?

A.—When the fund is vested in trustees, the purchaser or mortgagee should, before completion, inquire of the trustees if they have had notice of any prior assignment or charge. Upon completion, he should give notice to the trustees of his purchase or mortgage. So, if the fund is stock of any public company, a restraining order may be had on petition to the Court of Chancery. If the fund is in the Court of Chancery, a stop-order must be obtained on summons (if both assignor and assignee concur) or petition, served on the assignor. The order must be served on the assignor and the paymaster-general of the court : (Ayck. Pr. 296, 480, 9th edit.)

Q.—When will a purchaser or mortgagee be secure in paying the purchase or mortgage money to a bankrupt ?

A.—When really and *bonâ fide* made before the date of the receiving order, providing the person so paying to such bankrupt had not at the time of such payment notice of the act of bankruptcy : (46 & 47 Vict. c. 52, s. 49.)

Q.—How is a contract for sale affected by the bankruptcy of the vendor or purchaser ? State the law in either case.

A.—If the vendor becomes bankrupt after contract for sale, the trustee in bankruptcy is bound to carry it out, if the contract was made without notice of the act of bankruptcy and before the date of the receiving order. If the purchaser becomes bankrupt the contract is, if made in good faith, also binding : (Sug. Conc. V. 121.) But it appears that the trustee in bankruptcy may by writing disclaim the property contracted to be bought, and in such case the contract will be deemed to be determined from the date of the disclaimer, unless the trustee has neglected to disclaim in due time after being required to do so ; and if the vendor be injured thereby he may prove under the bankruptcy : (46 & 47 Vict. c. 52, s. 55.)

**Q.**—When does a bankrupt's real estate vest in the trustee in bankruptcy?

**A.**—Immediately on the debtor being adjudged bankrupt (46 & 47 Vict. c. 52, s. 54), (a) but the bankruptcy is to be deemed to have relation back to and commence at the time of the act of bankruptcy on which the receiving order is made, or the earliest within three months of presenting petition, if more than one: (s. 43.)

**Q.**—What is the effect of bankruptcy on a general power to appoint real estate?

**A.**—If the bankrupt might execute the power for his benefit (not being the right of nomination to any vacant ecclesiastical benefice), it may be executed by the trustee in bankruptcy for the benefit of the creditors, and he may execute all deeds necessary for such purpose: (46 & 47 Vict. c. 52, ss. 44, 56.)

**Q.**—How does notice of a trust affect a purchaser for valuable consideration?

**A.**—If a purchaser buy with notice of the trust he will be bound by it: (see St. Eq. § 395.) Unless it be a voluntary trust not in favour of a charity: (see Sm. Man. 100-104, 10th edit.)

**Q.**—Has any alteration of the law as to the purchase of reversions recently taken place, and, if so, what?

**A.**—Yes; now no purchase made *bond fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate, is to be hereafter opened or set aside merely on the ground of undervalue: (see 31 Vict. c. 4.) But this Act has not affected the jurisdiction of the Court of Chancery to give relief against unconscionable bargains: (*Tyler v. Yates*, 23 L. T. Rep. N. S. 447.)

**Q.**—In examining an abstract with the title deeds on behalf of a purchaser, what would be the consequence to the solicitor personally of his overlooking notice of any incumbrance contained in any instrument abstracted and produced for examination, whether such notice were contained in the abstract or otherwise?

**A.**—If the purchaser sustains any loss or injury in consequence of his solicitor's negligence, the latter will become personally liable to make good the same, and the purchaser will be entitled to maintain an action against him and recover damages accordingly: (see Arch. Nisi Prius, 3, 40, 402; Sug. Conc. V. 405.)

**Q.**—In examining an abstract what should be seen to in the case of one of the deeds being executed under a power of attorney?

**A.**—It should be seen that the person who gave the power was alive and not mentally incapacitated at the time of the execution of the deed.

**Q.**—On an exchange of land, what would be the consequence of ouster of one of the parties from defect of title?

**A.**—Formerly on an exchange of land there was an implied warranty, which engendered the right of entry in case of eviction; but since the

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(a) But *bond fide* dealings with the bankrupt, without notice and before the date of the receiving order, are protected: (46 & 47 Vict. c. 52, s. 49.)



8 & 9 Vict. c. 106, s. 3, the only remedy in such case is on the covenants : (see 1 Hughes' Pract. Sales, 247, 2nd edit.)(a)

*Q.*—If a purchaser buys an estate *free* from incumbrances, and it turns out on his investigating the title that there is a rentcharge due to a jointress upon it, how can the defect be remedied so far as to make a title to an unwilling purchaser ?

*A.*—The defect here is one of title, and not of conveyance merely, and can only be cured by the jointress voluntarily releasing the property from the charge. If she has married again, her husband must join in the release, and the deed be acknowledged by the wife : (Hughes' Conv. 16, &c.)

*Q.*—Define what is meant by the legal term “covenant.”

*A.*—A covenant is a kind of promise contained in a deed to do a direct act, or to omit one ; and is a species of express contract, the breach of which is a civil injury. The person who makes such a covenant is termed the *covenantor*, and he with whom it is made the *covenantee* : (Holth. L. D., 2nd edit.)

*Q.*—Does the word “grant” in a conveyance imply in all cases, or in any and what cases, a warranty of title ?

*A.*—This word does not imply any covenant in law in respect of any tenement, &c., unless made to do so by some Act of Parliament. By the Registry Acts for Yorkshire, the words *grant*, *bargain*, and *sell*, in a deed of *bargain and sale* of the fee enrolled in the register office, imply covenants for quiet enjoyment, and for further assurance, unless restrained by express words. The word *grant* also implies covenants for title in conveyances *by* companies under the Lands Clauses Consolidation Act, 1845, s. 132 ; and in conveyances to the Governors of Queen Anne's Bounty, stat. 1 & 2 Vict. c. 20, s. 22 : (Will. R. P. 446, 447, note, 13th edit.)

*Q.*—What is the technical distinction between absolute covenants for title and qualified covenants ? Who enters into the former, and who the latter ?

*A.*—Absolute covenants extend to the acts of the *whole world*, and are given by mortgagors ; qualified covenants are restricted to the acts of the *covenantor*, or of *himself* and *those under whom he claims* by descent or will, and are given by vendors : (see Will. R. P. 448, 13th edit.)

*Q.*—On a sale of freeholds, what covenants for title are entered into by an absolute owner and by a trustee for sale ? And is there any difference in the case of a mortgagor ?

*A.*—The vendor covenants that he has good right to convey, for quiet enjoyment, free from incumbrances, and for further assurance, but he covenants only for his own acts ; or, if he takes the estate by descent or will, for the acts of those through whom he claims. A trustee for sale simply covenants that he has not incumbered. The covenants by a mortgagor are similar to those by a vendor, except that they are absolute, extending to the acts of the whole world : (Will. R. P. 448, 13th edit.) In deeds executed after 31st December, 1881, the above covenants will be

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(a) But if an annuity is granted (exchanged) for a piece of land, and the land is lost by an older title, the annuity ceases : (1 Sm. Comp. 14, 4th edit.)



implied when the deeds are properly drawn : (see *ante*, p. 272 ; 44 & 45 Vict. c. 41, s. 7.)

*Q.*—In a conveyance of land by tenants in common, what covenants for title do the vendors enter into ; and are such covenants limited in any way ?

*A.*—The usual covenants would be implied in respect of each of the vendors conveying as beneficial owner “as to his undivided share of and in the hereditaments and premises granted to but not further or otherwise.” The covenants relate back to the acts of those who have been in possession since the last purchase.

*Q.*—What is meant by the term “a covenant running with the land ?”

*A.*—A covenant is said to run with the land when either the liability to perform it or the right to take advantage of it passes to the assignee of the land. Such are covenants for quiet enjoyment ; for further assurance ; to repair ; to pay rent and taxes ; to yield up possession, &c. : (*Spencer's case*, 1 Sm. L. C.)

*Q.*—What are the incidents to make a covenant run with the land ?

*A.*—The covenant must (1) directly extend or relate to the land conveyed or demised ; (2) there must be a privity of estate between the covenanting parties ; (3) the owner of the property must take the legal estate ; and (4) covenants for title in order to run with the land must be entered into with the seisinnee to uses, if one : (Sug. Conc. V. c. 14, s. 1 ; *Spencer's case*, *sup.*, *notis.*)

*Q.*—In the case of a purchase of lands by B., the conveyance being made to A. and his heirs, to the ordinary uses to bar dower in favour of B. (the purchaser), with a power of appointment given to B. ; with which of them should the covenants for title, &c., be entered into, and why ?

*A.*—The covenants for title must be entered into with A. (see 44 & 45 Vict. c. 41, s. 58), in order that they may run with the land. For, if entered into with B., and B. *appoints* to C., the covenants will not run with the land in favour of C., because B.'s estate is divested and not transferred to C. : (see Sug. Conc. V. 437 ; Hughes' Conv. 235.)

*Q.*—When trustees sell land under a power or trust for sale, with the assent of the tenant for life of the property, what covenants are the trustees and tenants for life respectively bound to enter into with the purchaser ?

*A.*—The trustees, having no interest, will merely covenant that they have done no act to incumber the land. The tenant for life will, however, be bound to covenant for title, *i.e.*, that he has good right to convey, &c. : (Sug. Conv. V. 433, 463.) But his covenants should, it seems, be confined to his interest, and not extended to the reversion : (Dart V. & P. 353 ; 2 Dav. Conv. 194.) After 31st Dec., 1881, see *supra* ; and 44 & 45 Vict. c. 41, s. 7.

*Q.*—What principle should govern the practitioner in setting forth the title to land after a contract for sale entered into ? Should all deeds affecting the title be set out in the abstract, and what will be the consequence to the vendor and his solicitor if any be kept back.

*A.*—In the absence of stipulation to the contrary, all deeds, &c. (save

expired leases) affecting the title for the last forty years should be set out in the abstract: (1 *Prid. Conv. Ch. on Abstract.*) And the 22 & 23 Vict. c. 35, enacts that any seller or mortgagor, or his solicitor or agent, who fraudulently conceals any instrument material to the title, &c., is guilty of a misdemeanour, punishable by fine or imprisonment for two years, with or without hard labour, or by both; and is also liable to an action for damages for any loss sustained. But no prosecution under this section can be commenced without leave of the Attorney or Solicitor-General: (see s. 24; also 23 & 24 Vict. c. 38, s. 8.)

**Q.**—At what place must the title deeds be produced for examination? and when the vendor and his solicitor reside at a distance from the premises, who must bear the extra expense of examination?

**A.**—The vendor may produce the deeds (1) either at his own known residence, or (2) upon or near the estate, or (3) in London; and the purchaser in such cases pays for the necessary journeys, &c., of his solicitor. The extra expense of the examination of all deeds not in his possession, as also of all journeys and all other incidental expenses, unless otherwise stipulated for in the conditions of sale, must be borne by the purchaser: (44 & 45 Vict. c. 41, s. 3.)

**Q.**—State the practice, in case a vendor is entitled to retain the title deeds, as to what the purchaser may require, and at whose expense.

**A.**—The practice is that the purchaser will be entitled to an acknowledgment from the vendor of his right for their production, and to have attested copies of them at his own expense: (44 & 45 Vict. c. 41, s. 9.)

**Q.**—Who should covenant for the production of title deeds which cannot be delivered to a purchaser?

**A.**—The vendor or the holder must give the above acknowledgment. If, however, the property be sold in lots, it is usually stipulated that the purchaser of the largest lot shall have the title deeds and do this: (*Will. R. P.* 464, 13th edit.)

**Q.**—Will a covenant for production or acknowledgment of right to produce title deeds in any and what case run with the land?

**A.**—A covenant for production of title deeds is a covenant running with the land in favour of a purchaser clothed with the legal estate. It would seem also to run in favour of the vendor, but it is not quite clear: (see *Sug. Conc. V.* 336.) An acknowledgment of right will run with the deeds: (44 & 45 Vict. c. 41, s. 9.)

**Q.**—If the purchaser of one lot of an estate give a deed of covenant for production of title deeds to the purchaser of another lot, and afterwards sell and convey the property he bought, and part with the deeds, will the covenant run with the land, and will his personal liability under the deed of covenant be discharged, or how is the discharge of it to be provided for, and the production of the deeds secured to the covenantor?

**A.**—A covenant for the production of the deeds runs with the land in favour of a purchaser; therefore, where a purchaser of one lot enters into a covenant for production of title deeds to the purchaser of another lot, and afterwards sells the property he bought and parts with the deeds, as it is not clear whether he is still liable on his covenant, the proper mode

is to insert a clause in the deed providing that, if he should sell the property bought, and part with the deeds, he will cause his purchaser to enter into the like covenant for their production before doing so: (see *Sug. sup.*) As to acknowledgment of right see *sup.*

**Q.**—Is the tenant for life, or the remainderman, entitled to the custody of the title deeds?

**A.**—The tenant for life is entitled to the custody of the title deeds; at all events when he is clothed with the legal estate (*Allwood v. Heywood*, 7 L. T. Rep. N. S. 640); but the remainderman may, under certain circumstances, apply to have them secured: (see *Sm. Man.*, sect. 737.)

**Q.**—The evidences of ownership of real property are the title deeds. Who is entitled to their custody in the following cases? (A.) An owner in fee simple who sells the bulk of his estate. (B.) A settled property with a tenant for life having the legal estate. (C.) The like with a tenant for life, equitable owner only.

**A.**—(A.) The owner in fee simple would be entitled.

(B.) The tenant for life.

(C.) The trustees of the settlement.

**Q.**—State shortly the course of proceeding on the sale and purchase of real estate, from the date of the contract to the completion.

**A.**—The agreement being signed, the vendor's solicitor delivers the abstract of title within the specified time to the purchaser's solicitor, who peruses it and examines it with the title deeds (see *infra*), and, if necessary, sends in requisitions on the title, which the vendor's solicitor must answer. The title proving satisfactory, the purchaser's solicitor prepares the draft conveyance, which is perused by the vendor's solicitor, and if approved is then engrossed by the former, who now searches for incumbrances, and if none, appoints to complete. On the day named the purchaser's solicitor attends and pays the purchase money; the vendor then executes the conveyance and hands over the title deeds: (*Green, Conv. 6 et seq.*) (a)

**Q.**—State what title deeds must a vendor of an estate agreed to be sold without special conditions deliver to the purchaser on completion of purchase. And what, if any, may he retain possession of?

**A.**—The purchaser of the estate is entitled to the title deeds exclusively affecting it; but if the vendor only sells a portion of his estate, he is entitled to retain them, the purchaser being entitled to attested copies at his own expense, and also to an acknowledgment of his right of production: (*Dart V. & P.* 4th edit., 618; 37 & 38 Vict. c. 78, s. 2; 44 & 45 Vict. c. 41, ss. 3, 9.)

**Q.**—What searches should be made before completing a purchase?

**A.**—Search should be made in the Registry of Judgments Central Office for judgments, *lites pendentes*, Crown debts and writs of execution, for a period of five years back, and for annuities (1 & 2 Vict. c. 110; 18 Vict. c. 15; 22 & 23 Vict. c. 35, s. 22); and if any judgment is

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(a) Also put thus: State shortly the duties of a solicitor in conducting the purchase of real estate.

found registered which was entered up after the 23rd July, 1860, also for registered writs of execution for a period of three calendar months back : (23 & 24 Vict. c. 38, ss. 1, 2 ; *ante*, tit. "Judgments.") So where the property lies in Middlesex, Yorkshire, Kingston-upon-Hull, or the Bedford Level, search must be made in the local register : (2 to 7 Anne ; 8 Geo. 2, c. 6.) Search is also sometimes made for bankruptcy and insolvency, and in case of copyholds the court rolls should be inspected : (see Sug. Conc. V. 394, &c. ; see also 25 & 26 Vict. c. 53.) (a)

*Q.*—What should be done to postpone searches for incumbrances until immediately before the completion of the purchase ?

*A.*—The search may be delayed by asking the vendor's solicitor if there are any incumbrances not appearing on the abstract, the disclosure of which would not be prejudicial to the purchaser, and if he replies that there are not, search may be postponed until immediately before the execution of the conveyance : (1 Hughes' Conv. 161, 162.) This question is usually put in the requisitions on the title, but it was held in the recent case of *Re Ford v. Hill* (48 L. J. 327, App.) that a vendor cannot be compelled to answer it.

*Q.*—You are concerned for a vendor, and just before the settlement you hear from the purchaser's solicitor that on searching he discovers a Crown debt registered against your client as surety to the Crown for a maltster ; what are you to do, and what is the ordinary course of procedure on such occasions by the Crown authorities ?

*A.*—The Commissioners of the Treasury, or any two of them, by writing under their hands to the debtor, upon such other terms as they think proper, certify that any lands, tenements, or hereditaments of such Crown debtor shall be held by the purchaser thereof, his heirs, executors, administrators, and assigns, wholly exonerated and discharged from all further claims of Her Majesty, her heirs or successors, for or in respect of any debt, claim, or liability present or future of the Crown debtor : (2 Vict. c. 11, s. 10 ; 12 & 13 Vict. c. 89.)

*Q.*—What effect have registered judgments upon real estates ; and what searches should be made before completing a purchase ?

*A.*—A judgment entered up after 29th July, 1864, does not affect lands until they have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority in pursuance of such judgment ; and such writ, with the sheriff's return indorsed upon it, must be registered ; and any such execution creditor may then obtain from the Court of Chancery by petition in a summary way an order for the sale of his debtor's interest in such lands : (Will. R. P. 88, 13th edit.)

For necessary searches, see *ante*.

*Q.*—What are the relative values of a will, a mortgage deed, a voluntary conveyance, a purchase deed, and a settlement as roots of title ? Give your reasons.

*A.*—A purchase deed or marriage settlement is the most desirable

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(a) When lands have got on, and so long as they remain on, the general registry, the local registry no longer applies (25 & 26 Vict. c. 53, s. 104) ; and the same if registered under the Land Transfer Act, 1875.

instrument with which to commence the abstract. If the title commences with the will of a person who died forty-five years since, then proof by old leases, declarations, receipts of rent, parish books, &c., should be supplied to show that he was in possession of the estate, or in receipt of rents and profits at the time of making his will as well as at his decease. A mortgage deed is almost of equal validity with a purchase deed as a root of title, since the title would probably have been well investigated before the execution of the mortgage, and the purchaser would have the benefit of the absolute covenants. As a voluntary conveyance is liable to be set aside under the statutes of 13 Eliz. c. 5, or 27 Eliz. c. 4, or under the Bankruptcy Law, this is an instrument which should provoke the greatest suspicion: (see Prideaux, vol. 1, Abstracts.)

**Q.**—An abstract of title has been delivered to the solicitor of a purchaser as an accurate and sufficient abstract of all the title deeds. The solicitor has to compare the abstract with the deeds. The abstract of the first deed states fully the parcels contained in it, and the abstract of all the other deeds refers to the parcels in the abstract of the first as the “premises comprised in the before-abstracted indenture.” The abstract of title also contains an abstract of a long and complex settlement with numerous special provisions and clauses which have not been abstracted. What are the duties of the solicitor with respect to the parcels in the several deeds and the provisions and clauses in the settlement, and generally with reference to the deeds and abstract? (*a*)

**A.**—The solicitor must carefully identify the parcels contained in the subsequent deeds with those in the deed first abstracted. Land tax and poor-rate assessments are usually received as evidence on this point. He must also peruse the clauses in the settlement to see that they do not prejudicially affect the property purchased. In fact, the duties of the purchaser’s solicitor, with reference to the deeds and abstract, are to peruse the abstract, and then examine it with the title deeds, and see that there is a clear deduction of both the legal and equitable estate, free from incumbrance; that all the deeds are properly stamped, executed, and when necessary, attested, and receipts indorsed, &c., and that a good title is clearly made out: (see Hughes’ Conv. 10, 17, &c.)

**Q.**—What is the usual mode of verifying an abstract?

**A.**—By production of the deeds and documents abstracted, or other sufficient evidence. Births, deaths, and marriages are proved by certificates of these facts from the parochial or general registry kept at Somerset House; wills by the probate, or an office copy thereof; fines by the chirograph, or exemplification, or examiner’s copy thereof; recoveries by the exemplifications or examiner’s copy; intestacies by letters of administration; acknowledgments of married women by the memorandum on the deed and certificate. (*b*) If the title deeds are lost or destroyed, their loss and due execution must be proved. Due execution of powers are proved by the attestations. As to proof of identity of parcels, see *supra*: (1 Prid. Conv. 140 *et seq.*, 9th edit.)

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(*a*) Also put thus: What are the duties of a solicitor in comparing an abstract with the title deeds, &c.?

(*b*) Since 1882 the certificate is abolished: (45 & 46 Vict. c. 39, s. 7, and Rules of Dec. 1882.)

**Q.**—On the sale of land held by under-lease, what is to be assumed by the purchaser on production of the receipt for the last payment due for rent under the under-lease?

**A.**—Unless the contrary appears, that all covenants and provisions of the under-lease have been observed and performed, and that all rent due under any superior lease, and the covenants, &c., thereof have been paid and performed: (44 & 45 Vict. c. 41, s. 3 (5).)

**Q.**—If the abstract show a good title on the face of it, but the purchaser's solicitor, on comparing it with the title deeds, discovers an incurable defect, is the purchaser entitled to recover from the vendor the expense of comparing the abstract with the deeds; and would he be so if the defect appeared on the face of the abstract?

**A.**—In the first case given the purchaser will be entitled to recover from the vendor the expense of comparing the abstract with the deeds. If the abstract be defective on the face of it, the purchaser's solicitor will be entitled to the costs of perusal, &c.; unless in either case the contract is by parol or the contrary stipulated: (see Sug. Conc. V. 262; Hughes' Conv. 172, 173.)

**Q.**—What is the general principle on which presumption may supply deficiencies in proof of the existence or due execution of material instruments relating to a vendor's title? Give illustrations.

**A.**—The principle is, that where there has been a long enjoyment of any right which could have had no legal origin except by deed, then, in favour of such enjoyment, all necessary deeds may be presumed, if there be nothing to negative such presumption. Thus, a reconveyance of the legal estate from trustees has been presumed, the property having for 110 years been dealt with without reference to its remaining outstanding, although the enjoyment was consistent with the supposition of such being the case; so, the fact of a lease having been duly executed has been held sufficiently proved by the production of the counterpart: (1 Dart V. & P. 299, 4th edit.)

**Q.**—What is the rule as to the presumption of fact between vendor and purchaser?

**A.**—That the purchaser must admit as presumption all matters which in a court of law the judge would clearly direct the jury to presume, but not matters as to which the judge would leave it to the jury to pronounce upon the effect of the evidence: (1 Dart V. & P., 4th edit. 303.)

**Q.**—If you had to advise on the sale of building land in fee in lots, and were required to make the best provision for the common use of streets, roads, drains, &c., or for the prevention of building, or securing easements, how would you proceed to carry out the object—by vesting land in common use, in trust, or by granting a rentcharge in favour of one lot over another, or by mutual covenants between the purchasers framed in the best way the law would admit, so as to run with the land, or by what means?

**A.**—Rights to the common use of streets, roads, drains, or other easements are usually granted, or reserved in the same conveyance with the property to which they appertain, wherein they should be included in express terms: (Hughes' Conv. 562.) To prevent building and to secure



the streets open, the purchasers of each lot should enter into a covenant to that effect. But such a covenant entered into by a purchaser of the fee would only be a covenant in gross, and would not, strictly speaking, run with the land; yet equity would restrain every purchaser with notice from using the land contrary to the covenant. In order that such a covenant may run with the land the vendor should grant the estate to the purchaser for a long term of years instead of in fee: (see 1 Prid. Conv. 197, 9th edit.; *Tulk v. Moxhay*, 2 Phill. 774; *Western v. Macdermot*, 15 L. T. Rep. N. S. 641; *Haywood and Brunswick Building Society*, 51 L. J. 73, Q. B.)

**Q.**—On a sale in fee of building land in plots, how can you best secure in perpetuity the purchaser of one lot against building or annoyance from another? State any different modes of effecting this.

**A.**—In addition to what has been said above, this object may be accomplished by way of use, by vesting the land in trustees upon trust, &c., to continue unbuilt upon, &c. So private Acts of Parliament are sometimes used for this purpose in case of squares in towns: (see Byth. & Jar. Conv. tit. "Purchase Deeds.")

**Q.**—When land is settled upon trust for sale, and the trusts are declared by a separate deed, what clauses should the conveyance in trust for sale contain?

**A.**—The land should be conveyed to the grantees upon trust that they, or the survivors or survivor of them, or the heir, executors, or administrators of the survivor, shall, with all convenient speed, sell, &c., together or in lots, by public auction or by private contract, buy in and re-sell without being responsible, with power to convey, &c., and stand possessed of the moneys arising therefrom upon the trusts declared by an instrument of, &c. It also seems desirable to give the trustees powers to limit the property to such uses as the purchaser shall direct. Power for the grantees or the survivor, &c., to give receipts should be added.

**Q.**—Upon a sale of part of an estate without any stipulation as to deeds, who is entitled to the custody of them; and if the purchaser, is he bound to furnish the seller (who retains the other part of the estates) with attested copies, and at whose expense?

**A.**—On a sale of part of an estate without any stipulation as to deeds, the vendor is entitled to their custody; but he must furnish the purchaser with attested copies at the purchaser's expense, and execute an acknowledgment for their production, and pay for the perusal and execution of the latter by all necessary parties: (Dart. V. & P., 4th edit. 618; 37 & 38 Vict. c. 78, s. 2; 44 & 45 Vict. c. 41, s. 3.)

**Q.**—Where a purchaser has not obtained the title deeds, or a covenant for the production of them, can he require such a covenant to be executed to him under the usual covenant for further assurance?

**A.**—It seems not; the covenant for further assurance being restricted to mean assurance by way of conveyance, and not to comprehend further obligations, to be imposed on a vendor by way of covenant: (see *Fain v. Ayres*, 2 Sim. & St. 538; Sug. Conc. V. 326.)

**Q.**—If a person contract for the sale of his estate, and afterwards



become a lunatic, who can convey the estate to the purchaser ; and what course should be pursued on such an occasion ?

A.—Application should be made to the Lord Chancellor for a vesting order, which has the same effect as if the party had been sane, and had duly executed a conveyance of the lands in the same manner and for the same estate. A person may be appointed to convey if thought necessary : (13 & 14 Vict. c. 60 ; Sug. Conc. V. 144, 145, 148.)

Q.—Give the heads of a conveyance in fee to the committee of a lunatic of hereditaments purchased by leave of the court out of money forming part of the lunatic's personal estate.

A.—Date. Parties—Vendor of first part, the lunatic (by A., the committee of his estate) of the second part, and B. and C. trustees of the third part. Recitals of agreement for sale to committee on behalf of lunatic, of report of Master in Lunacy, and fiat of Lords Justices approving purchase of direction as to raising purchase money, and certificate to whom such purchase money is to be paid, and that the master approves of conveying deed, testatum, &c. Parcels. Habendum to the trustees to the use of the lunatic for a long term of years, and after expiration of term to the trustees in fee in trust for lunatic, his executors, &c., to the intent that the premises may be treated as personal estate.

Q.—If a man seised in fee of land contract with another for the sale of it, and both parties die before the sale is completed, does the contract continue in force ; and what is the consequence as regards the title to the land, and as regards the title to the purchase money ?

A.—The contract continues in force in equity notwithstanding the death of both parties, for equity looks upon that as done which is agreed to be done. The heir or devisee of the purchaser will be entitled to the land, but cannot now (40 & 41 Vict. c. 34) require the purchase money to be paid out of the purchaser's estate. The personal representatives of the vendor are entitled to the purchase money, and must join his heir or devisee (who is a trustee of the legal estate) in the conveyance : (Sug. Conc. V. 122, and see next answer.) In case of death after 31st Dec., 1881, the personal representatives of the vendor may convey : (44 & 45 Vict. c. 41, s. 4.)

Q.—If an infant contract for the purchase of land, and die before completing and without having attained twenty-one, what are the rights of his representatives and of the vendor with regard to the contract ?

A.—An infant can purchase ; but on his attaining twenty-one, he may, at his option, adopt or abandon the contract, and should he, either having attained twenty-one, die without exercising or relinquishing such option, or die under that age, the like privilege descends on his representatives.

Any written instrument signed by the infant after attaining majority is a ratification, if it would amount to an adoption of the contract if signed by an adult. It is conceived that the Infant Relief Act, 1874, does not apply to the confirmation of such a contract.

And an express ratification is not essential ; mere acquiescence may suffice, *e.g.*, occupation or receipt of the profits without dissent, for a short time after attaining majority, would, it is conceived, confirm the trans-

action by election, but the vendor cannot maintain an action for the purchase money unless he can prove a ratification in writing: (Dart V. & P. 25, 26, 5th edit.)

*Q.*—Is the devisee of an estate contracted to be sold, but not conveyed, to the testator, entitled to have a conveyance to him from the vendor; and by whom, and from what fund is the purchase money to be paid, and why?

*A.*—The devisee will be entitled to have a conveyance of the estate to him, and formerly he could also require that the purchase money should be paid by the executor out of the personal estate of the testator (St. Eq. §§ 64 g. 738 *et seq.*; Sug. Conc. V. 125); but by the 30 & 31 Vict. c. 69 (the Act to amend the 17 & 18 Vict. c. 113), it is enacted that “the word ‘mortgage’ shall be deemed to extend to any lien for unpaid purchase money upon any lands or hereditaments purchased by a *testator*”: (sect. 2.) And by 40 & 41 Vict. c. 34, this is extended to land purchased by an intestate dying after 1877, and to leaseholds.

*Q.*—A., seised in fee of certain real estate, mortgages it to B. for 10,000*l.* He subsequently sells a portion of such real estate to C. for 12,000*l.*, and pays off B.’s mortgage out of the purchase money, B. joining with A. in the conveyance to C. B. subsequently dies intestate. A. dies, having devised all his real estate to trustees upon trust for sale. On the sale by A.’s trustees of the real estate formerly mortgaged to B., who are the parties to convey to a purchaser?

*A.*—The personal representative of B. must join with the trustees for sale in the conveyance to the purchaser to convey such legal estate, it being now provided by 38 & 39 Vict. c. 87, s. 48, that on death of a bare trustee intestate seised in fee, as such, of any hereditaments, such hereditaments vest in his legal personal representative for the time being. This section is repealed, since 31st Dec., 1881, by sect. 30 of 44 & 45 Vict. c. 41, and all trust and mortgage estates vest in the personal representatives on death of trustee or mortgagee.

*Q.*—Who can convey the land of a deceased copyhold tenant—(1) where at his death there was subsisting a contract enforceable against his heir or devisee for the sale of such land; (2) where he was sole trustee?

*A.*—(1) Either the heir or devisee, or by sect. 4 of 44 & 45 Vict. c. 41, the personal representative.

(2) The personal representative (*Ib.*, s. 30.)

*Q.*—A., being a bare trustee of lands held in fee simple and also of terms of years, died intestate in 1877. Who will be the necessary parties to convey the legal estate in each class of property?

*A.*—The administrator can now convey in each case, as by 38 & 39 Vict. c. 87, s. 78, upon the death of a bare trustee intestate as to any corporeal or incorporeal hereditament, of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee. In case of death after the 31st December, 1881, the personal representative of the trustee must convey in all cases: (44 & 45 Vict. c. 41, s. 30.)

**Q.**—On the death of a bare trustee intestate as to hereditaments of which he was seised in fee, part being registered under the Land Transfer Act, 1875, and part not so registered, in whom do such hereditaments vest respectively?

**A.**—As to the part registered under the Act of 1875, the hereditaments will vest in his heir-at-law, and as to the unregistered part, they will vest in his administrator: (see sect. 48 of the Act.) But in case of death after the 31st December, 1881, the hereditaments will devolve on the personal representatives in both cases: (44 & 45 Vict. c. 41, s. 30.)

**Q.**—Would a contract for the purchase of land be impeachable or not by a vendor, on the ground of considerable inadequacy of consideration, but not of fraud?

**A.**—Mere inadequacy of consideration, or any other inequality in the bargain, does not constitute by itself a ground for avoiding the contract: (*Longmate v. Ledger*, 2 L. T. Rep. N. S. 256; St. Eq. § 244; 31 Vict. c. 4, ss. 1 and 2.)

**Q.**—Is a purchaser bound to take a conveyance executed by the attorney for the vendor, under a power of attorney, with any and what form of condition?

**A.**—He is not, unless an actual necessity appears for it, because the vendor may be dead at the time the power is exercised, and in that case the execution would be void, as a power of this nature expires by the death of the principal. If a purchaser does take a conveyance so executed, the attorney should also execute a declaration of trust, that he will stand possessed of the purchase money in trust for the purchaser, until it is proved that the vendor was alive at the time of the execution of the deed, or, if dead, until the estate is duly conveyed to the purchaser: (Sug. Conc. V, 420, 421.) A power of attorney given for value may now be made irrevocable, or in any case for a period not exceeding a year: (45 & 46 Vict. c. 39, ss. 8, 9.)

**Q.**—A vendor proposes to execute a conveyance by power of attorney; what requisition would you make on behalf of the purchaser?

**A.**—That until proof that the vendor was alive at the time the conveyance be executed, or a proper conveyance of the legal estate be executed, that the purchase money be paid into a deposit account at a bank in the joint names of the purchaser and vendor's agent, unless the power were irrevocable as stated in last answer.

**Q.**—Is a vendor bound to disclose to a purchaser a latent defect in the title?

**A.**—Yes; if the purchaser cannot discover the defect, and the vendor be aware of it, and do not acquaint the purchaser with the fact, the contract is not binding, although the purchaser bought the estate with all faults: (Sug. Conc. V. 238; *Edwards v. Wicwar*, 13 L. T. Rep. N. S. 428: s. c. L. Rep. 1 Eq. 68.)

**Q.**—If the grantee of an annuity employ the grantor's solicitor to prepare the deeds, is such solicitor bound to disclose any circumstance that may affect the security?

**A.**—It seems not; if the grantee employs the grantor's solicitor to

prepare the deeds, the mere preparation of the deeds does not place him in a confidential relation towards the grantee: (Sug. Conc. V. 6.)

**Q.**—Ought a purchaser of an estate to ascertain the terms of the tenancy of the occupier of the estate, and why?

**A.**—He should; for he will be bound by the terms of the holding, notice of a tenancy being considered as implied notice of the terms upon which the premises are held: (1 Hughes' Conv. 157; Sug. Conc. V. 6, 611, *et infra*.)

**Q.**—If a contract of sale describe property as leasehold, can the purchaser successfully resist an action for specific performance, on the ground that after the contract he discovered that the lease contained an unusual covenant?

**A.**—He cannot do so if there is no misrepresentation; for notice of a lease is notice of the contents: (see Sug. Conc. V. 6, 611; *Ld. St. Leonards' Handy Book*, 29, 6th edit.; but see *Wilbraham v. Livesay*, 2 W. R. 281.)

**Q.**—Referring to the Act to amend the Law of Real Property, 1845, state the purport of its provisions under these heads, or some of them: 1, the operation of a deed of grant, feoffment, exchange, and partition respectively; 2, allowing the giving of an immediate estate, or the benefit of a condition or covenant, to a person not a party; 3, the power of disposition by deed of contingent, executory and future interest; 4, the alteration of the law in regard to contingent remainders.

**A.**—1. The 8 & 9 Vict. c. 106, enacts that after 1st Oct., 1845, all corporeal tenements shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery: (sect. 2.) A feoffment other than a feoffment made under a custom by an infant, is void at law, unless made by deed, but has no longer a tortious operation; and a partition and exchange of any tenement or hereditaments not being copyhold, made after this date, are also void at law, unless evidenced by deed, but do not imply conditions: (sects. 3 and 4.)

2. Under an indenture executed after 1st Oct., 1845, an immediate estate or interest in, and the benefit of a condition respecting, any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the indenture: (sect. 5.)

3. A contingent, or a future interest, and a possibility coupled with any interest in any tenements or hereditaments of any tenure, and a right of entry, whether immediate or future, vested or contingent, may be disposed of by deed; but no disposition by force of this Act is to bar an estate tail, and married women are to convey according to the statute 3 & 4 Will. 4, c. 74: (sect. 6.)

4. It is also provided that a contingent remainder shall be capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened: (sect. 8.)

**Q.**—What is necessary to effect an exchange of lands under the General Inclosure Acts?

**A.**—The exchange must be with the written consent of the persons interested in the lands exchanged; and if of ecclesiastical lands, with the

consent of the bishop of the diocese and the patrons of the living. The exchange must also be specified in the award: (41 Geo. 3, c. 109, s. 15, and 8 & 9 Vict. c. 118, s. 92.) If the lands are not liable to be inclosed, the commissioners are to inquire if the exchange be just, and give an order of exchange with a map annexed: (s. 147.)

*Q.*—What are the objections to cross conveyances by way of exchange? By what means can they be obviated?

*A.*—In an exchange made through the agency of the Inclosure Commissioners, the land acquired in exchange becomes subject to the title on which the lands given in exchange were previously held: (see 8 & 9 Vict. c. 118, s. 147.) But on an exchange by cross conveyance there is no shifting of title. (*a*)

*Q.*—B. purchases from A. fifteen acres of land in a hamlet, A.'s title deeds disclosing a clear sixty years' title to fifteen acres of land in that hamlet. Ought anything more to be done by B. before he can safely take a conveyance from A. and pay the purchase money?

*A.*—In this case B. may, if he has identified the parcels (the point the question aims at) and has made the necessary searches for incumbrances (as to which see *ante*), and finds none, except what may be disclosed on the abstract of title, if any, take a conveyance of such lands and pay the purchase money.

*Q.*—A., possessed of leaseholds for years, appoints B. and C. his executors; B. proves the will; C. renounces; B.'s executor afterwards sells the leaseholds to D. Is any evidence of the title subsequent to A.'s death necessary beyond the probate of the wills of A. and B.?

*A.*—Formerly, in addition to the probates of the wills, you must have set out a double renunciation by C. or his death, for the rule was that a renouncing executor, if alive, must again have renounced before any other person was allowed to administer the estate of his testator; but now this is not so: (see Coote's Pro. Pr. 192, 6th edit.) So that in addition to the probates, it will be sufficient to set out the original renunciation of C.

*Q.*—Who are the proper parties to assign a lease of a deceased testator, who bequeathed it specifically, and why?

*A.*—The legatee is the proper conveying party, but he must show the assent of the executor, which is best done by the executor joining in the deed of assignment. The reason for requiring this assent is that chattels real go in the first instance to the executor for the payment of the testator's debts; in order to do which the executor has absolute power to assign and dispose of them, and his receipt is a sufficient discharge to a purchaser, notwithstanding the leaseholds may be specifically bequeathed: (see Burt. Comp. pl. 931, 932; 3 Prest. Abr. 145.)

*Q.*—If leaseholds are bequeathed subject to legacies payable to adults, what (if any) liability attaches to a purchaser from the executor to see to the application of the purchase money? State your reasons.

*A.*—Inasmuch as the executor has full power to sell and assign the

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(*a*) The following question is also answered above: Is there any and what means of carrying out an exchange where difficulties of title exist on either side?

leaseholds, as stated in the preceding answer, no liability whatever to see to the application of the purchase money attaches to the purchaser.

**Q.**—Can an executor make an assignment of leasehold estates and give a receipt for the purchase money, and compel a purchaser to pay, before probate?

**A.**—An assignment of leaseholds by an executor before probate is good (and consequently his receipt for the purchase money), but the will must eventually be proved, as the probate copy is the only evidence of the appointment of the executor: (see Dart V. & P., 2nd vol., p. 580, 4th edit.) And if he die before probate letters of administration *cum testamento annexo* must be produced instead; but he could not compel a purchaser to pay before probate, as it would be necessary for him to prove himself executor at the trial, which he could only do by showing the probate: (Wms. on Exors., 5th edit., p. 258.)

**Q.**—What is an improved leasehold ground rent, and how is it usually created?

**A.**—An improved leasehold ground rent is where a lessee grants an under-lease at a higher rent than he pays. It is usually created by a demise of land upon building lease, the lessee either building and selling or letting at a higher rent, or granting under-leases for the purpose. The difference between what the lessee pays his lessor and what he receives from the under-lessee is thus the "improved" ground rent.

**Q.**—What advantages are there in buying a freehold ground rent in preference to a leasehold ground rent?

**A.**—By a freehold ground rent is understood not a rentcharge in fee, but the fee subject to a building lease on which a small rent is reserved, usually for 99 years or less. On the expiration of the term the ground rent determines, but the premises, with all the buildings thereon, revert to the owner of it. It is thus preferable to a leasehold ground rent, which simply determines on the expiration of the term, and is liable to a forfeiture if covenants of the original lease be broken.

**Q.**—In perusing an abstract of title you meet with an owner in fee simple dying intestate since the year 1853. What possible incumbrances or burdens on his property must you see to the absence or discharge of?

**A.**—You should see particularly that the succession duty has been paid, as this is by the Act (16 & 17 Vict. c. 51) a first charge on the property of any person dying after 19th of May, 1853. The purchaser should also make the usual searches in the Central Office for judgments, writs of execution, Crown debts, annuities, and *lites pendentes*, and if the property is situate in a register county the local registries must be searched. It should also be seen whether any dower attaches.

**Q.**—What is a power of attorney, and how is it put an end to?

**A.**—A power of attorney is a writing authorising an attorney to do any lawful act in the stead of another, as to recover debts, &c.: (Holth. L. D., 2nd edit.) It may be revoked by instruments of the same nature; that is to say, by deeds under seal by the persons giving the power. It is also revoked by death. A power of attorney given for a valuable consideration cannot, however, be revoked except by the death of the grantor: (Sug.



Conc. V. 425; and by 44 & 45 Vict. c. 41, s. 47, the holder will not be liable for any payment or act done under it without notice of revocation, but the person interested may recover against the payee.) By 45 & 46 Vict. c. 39, ss. 8, 9, it may be made irrevocable: (see next answer.)

**Q.**—What is the effect, in favour of a purchaser for value, of a power of attorney for value made absolutely irrevocable, executed since the 31st December, 1882?

**A.**—It cannot be revoked by the donor (without the concurrence of the donee), or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor, and any act of the donee in pursuance of the power will be valid, notwithstanding such events, and neither the donee nor purchaser will be affected by notice of them: (45 & 46 Vict. c. 39, s. 8.)

**Q.**—In what session of the present reign was the Succession Duty Act passed? How does this affect the title to be shown to real estate? (*a*)

**A.**—This Act was passed in the 16th and 17th session of the present reign. It affects the title to be shown to real property thus: where succession duty is imposed by the Act (see *infra*) it becomes a first *charge* on the *lands* liable, and is a debt to the Crown from the successor, having priority over all charges and interests created by him. Therefore the purchaser of such lands should call for the receipt for such duty, which receipt exonerates every *bond fide* purchaser for value without notice from liability: (see 16 & 17 Vict. c. 51, ss. 42, 44, 52.)

**Q.**—State in general, but accurate, terms, what is a succession within the Succession Duty Act, 1853, and the description of property charged; say if leaseholds are treated as real or personal property. Give an instance or instances of succession whereon the duty attaches. Say how far the duty attaches on interest aliened before the succession takes effect. By what rule is the value of the succession measured? How does the charge affect alienees by titles arising after the duty attaches, and *that* in the case of property, real and personal respectively, and what power is there of making separate assessments so as to discharge portions of property from the liability? If you do not answer the whole, answer some parts of the questions.

**A.**—By sect. 2 all dispositions or devolutions of property, whereby any person becomes beneficially entitled thereto, or to the income thereof, upon the death of any person dying after the commencement of this Act (19th May, 1853), either immediately or after any interval, &c., are deemed to confer on the person entitled by reason of such disposition or devolution a "succession." Leaseholds now pay succession duty: (sect. 1.)

If any succession shall, before the successor becomes entitled thereto in possession, have become vested by alienation (or any title not conferring a new succession), in any other person, the duty is to be paid at the same rate and time as it would have been payable if no such alienation had been made: (sect. 15.)

The interest of a successor to real property is considered to be of the

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(*a*) Also put thus: If A. comes into possession of an estate as tenant in fee on the death of another who died since the Succession Duty Act of 1853, and sell it, what are the duties of the purchaser's solicitor with regard to any liabilities imposed by that statute?



value of an annuity—equal to the net annual value of such property during his life, or for any less period during which he may be entitled : (sect. 21 ; see also sect. 10.)

The duty is a first charge or debt due to the Crown on the interest of the successor, and of all persons claiming in his right on real property whereon the duty is assessed, and also on the interest of the successor in personal property, while the same remains in the ownership or control of the successor or of any trustee for him, or of his guardian, &c., or of the husband of any wife who shall be the successor : (sect. 32.) But a *bond fide* purchaser for value, and without notice, is protected by the receipt or payment of the duty, notwithstanding any misstatements, &c. : (sect. 52.)

Upon being requested, the commissioners are to make separate assessments of the duty payable in respect of separate properties, or in defined portions of the same property ; and in such cases the respective portions are chargeable only with the amount of duty separately assessed, &c. : (sect. 43.)

**Q.**—What is the law as to “transmitted succession,” “transferred interests by alienation, or other derivated title,” and “accelerated successions” ?

**A.**—In case of transmitted successions one duty only is payable, and that by the party who becomes entitled in possession, but at the highest rate that any of them would have paid : (sect. 14.)

A transferee pays at the same rate and time that the original person entitled would have paid if no alienation had taken place. In case of an accelerated succession the duty is payable at the same time and in manner as if no such acceleration had taken place : (sect. 15.)

**Q.**—What are the exemptions from succession duty on property of such a nature as to fall within the Act ?

**A.**—Life policies held by others and *post obit* bonds are exempted from the operation of the Act by sect. 17, and where the whole succession or successions derived from the same predecessor are under 100*l.*, or any succession is under 20*l.* in value, no duty is payable, nor where legacy duty is payable in respect of the same : (sect. 18.)

**Q.**—Mention four distinct and different cases of succession duty.

**A.**—1. If a person becomes beneficially entitled to real property including leaseholds, or the income thereof by will or descent, he pays duty.

2. If a person should (for example) take personal property by marriage settlement, as if 10,000*l.* be settled on A. for life, remainder to B., B. on A.'s death must pay duty.

3. If a person has a power of appointment over property to take effect on the happening of a death, duty must be paid. If it is a general power, the appointor pays duty ; if a special power, the appointee.

4. If a person derives a benefit by the extinction of a charge determinable on death, he pays duty. As if A. having realty subject to a jointure rentcharge in favour of B., on the death of B., A. must pay duty : (see 16 & 17 Vict. c. 51, ss. 2, 5 ; Hayes & Jarm. Conc. Wills, 601 *et seq.*, 6th edit.)

**Q.**—If a person, who is tenant for life of property under a will, dies before all the instalments of succession duty are paid, what is the effect with regard to the unpaid instalments, and what the effect where the person who is entitled to the fee simple dies before all the instalments are paid?

**A.**—The effect as to the tenant for life is that the instalments not due at his death cease to be payable. But in the case of a tenant in fee, he being capable of devising his interest by will, the instalments unpaid at his death will be a continuing charge on the estate, in exoneration of his other property, and will have to be paid by the owner for the time being of such estate: (see 16 & 17 Vict. c. 51, s. 21; Will. R. P. 289, 13th edit.)

**Q.**—What provision does the Succession Duty Act contain with regard to timber and advowsons?

**A.**—Where timber, trees, or wood (not being coppice or underwood) are comprised in a succession, the successor is chargeable with duty upon his interest in the net moneys (after deducting all necessary outgoings for the year) which from time to time he receives from any sales of the timber, &c., exceeding 10*l.* in any one year, and must account for and pay the same yearly. The successor may, however, commute the duty, in the mode pointed out by the Act: (16 & 17 Vict. c. 51, s. 23.) No duty is chargeable in respect of any advowson unless the same or some interest therein is disposed of by the successor, in which case duty is to be paid on the amount or value of the money or money's worth for which the same was disposed of: (*Ib.*, s. 24.)

**Q.**—A., the father, being tenant for life, and B., his son, tenant in tail, under a deed of gift from a stranger, joined together (before the Succession Duty Act) and barred the entail and settled the estate to such uses as they should jointly appoint. Subsequently, by a deed, after many years, they resettle the estate under their joint powers to A. for life, and then to B. for life, with various remainders over. A. dies after the Succession Duty Act passed, and B. comes into possession. Is B. liable to succession duty, and at what rate? Are there any cases on the subject?

**A.**—B. is liable to succession duty at the rate of 10 per cent. Sect. 12 of the Succession Duty Act provides that where any person shall take a succession under a disposition made by himself, then if at the date of such disposition he shall have been entitled to the property expectantly on the death of any person who shall die after the commencement of the Act and during the continuance of such disposition, he should be chargeable with duty on his succession at the same rate as he would have been if no such disposition had been made: (see *Attorney-General v. Sibthorpe*, 28 L. J. 9, Exch.; *Attorney-General v. Lord Braybrooke*, 31 L. J. 177, Exch.; *Re Peyton*, 31 L. J. 50, Exch.; *Attorney-General v. Glover*, 31 Exch. 404, &c.)

**Q.**—Land is settled to A. for life, remainder to B. in fee; B. dies in A.'s lifetime before the Succession Duty Act, and devises the reversion to trustees in trust for sale; money to be in trust for B.'s wife for life, and after her death for his children: A. dies after the passing of the Succession

sion Duty Act. Is the life interest of B.'s wife liable to succession duty or not? State your reasons.

A.—The husband or wife of a predecessor, testator or intestate, is exempt from legacy or succession duty. But by sects. 2 and 15 of the Act 16 & 17 Vict. c. 51, it is enacted that when reversionary property is vested by alienation, or other derivative title, in some one other than the original remainderman, the substituted person is chargeable with the same rate of duty, and at the same time, as the remainderman. Now, as the husband dies before the Act, and a devolution to create a succession must be on a death after the Act, the widow does not claim as successor to her husband, and is liable to duty: (see *Attorney-General v. Rushton*, 9 L. T. Rep. N. S. 332.)

Q.—A. devises his freehold estate to his nephew B. for his life, and after his decease in fee to such child of B. as B. shall appoint. B survives A. fifteen months and appoints the estate to his eldest son C., who survives his father six months. How is succession duty payable on the interests of B. and C., and who is the predecessor in each case?

A.—A. is the predecessor in both cases, as persons taking under a *limited* power of appointment are deemed to take from the person creating the power: (16 & 17 Vict. c. 51, s. 4.) The succession in either case is calculated as an annuity for the respective lives of B. and C., equal to the annual value of the property, and duty at the rate of 3 per cent. is chargeable, payable by eight half-yearly instalments, commencing at the end of a year from the decease. As B. has no power to dispose by will of the property, only the first instalment is payable and the others lapse. In the case of C. no instalments become due in his lifetime, but if he was competent to dispose by will of the continuing interest in such property, in such case the duty would be a continuing charge upon the property and payable by the next owner: (s. 21.)

Q.—What do you understand by the doctrine of estoppel? and can it arise under a deed poll?

A.—Estoppel we have already defined *ante*, p. 11. It can arise under a deed poll: (Co. Lit. 352 b.) But a deed poll is but of one part, and will be expounded to be the sole deed of the party making it, and the words therein contained will be construed to be binding on him only, and therefore cannot create an estoppel in point of estate: (1 Hughes' Pract. Sales, 188, 2nd edit.)

Q.—Will the doctrine of estoppel prevent a deed from being impeachable for fraud or illegality?

A.—No; although in general the parties to a deed are estopped from contradicting it, an exception is allowed in the cases given on grounds of public policy: (2 St. C. 108, 8th edit.)

Q.—What *ad valorem* duty attaches on a conveyance, a mortgage, and a settlement?

A.—On conveyances *ad valorem* duty is paid at the rate of 10s. for every 100*l.* and 2s. 6*d.* for every 25*l.* up to 300*l.*, and if the consideration is over 300*l.* then 5s. for every fractional part of 50*l.* On a mortgage the rate is only 2s. 6*d.* per 100*l.*, and if the consideration exceed 300*l.*, 2s. 6*d.* on every fractional part of 100*l.* Settlements of personal property (other

than settlement for *bonâ fide* pecuniary consideration) are chargeable with *ad valorem* duty at the rate of 5s. per 100l., and, if the amount settled exceed 100l., also on every fractional part of 100l.: (33 & 34 Vict. c. 97; 46 & 47 Vict. c. 55 s. 15.)

Q.—What stamp duty is payable on each of the following instruments:—(1) A conveyance in consideration of 500l., of the equity of redemption of land which is subject to a mortgage for 950l. (2) Articles of partnership not executed under seal. (3) A deed of covenant for production of title deeds.

A.—(1) The stamp duty is payable on the whole of the consideration money 1450l. and would therefore amount to 7l. 5s. (2) A 6d. stamp. (3) An ordinary deed stamp of 10s.: (33 & 34 Vict. c. 97.)

Q.—A. effects a policy of insurance on his life for 10,000l., and immediately settles it in favour of his wife and children, but enters into no covenant for payment of future premiums. How would you stamp the settlement?

A.—By sect. 124 of 33 & 34 Vict. c. 97, in such case the *ad valorem* duty 5s. per cent. is to be charged only on the value of the policy at the date of the instrument.

Q.—In cases of doubt as to the proper stamp to be put on a deed, what course would you recommend to be adopted for your client's security?

A.—I should advise him to take the deed to the Commissioners of Inland Revenue, and they will assess the stamp duty which in their judgment is chargeable, and, upon payment of that amount, the commissioners are to impress upon such instrument an adjudication stamp. And every deed so stamped is to be receivable in evidence, notwithstanding any objection as to the insufficiency of the stamp; to this there are some exceptions: (see 33 & 34 Vict. c. 97, s. 18; Sug. Conc. V. 424.)

Q.—Is there any necessity to state in a deed all the facts and circumstances affecting its liability to duty, and would any penalty attach to the omission of any of such particulars?

A.—By 33 & 34 Vict. c. 97, s. 10, if this be omitted to be done with the intent to defraud the Crown, a penalty of 10l. attaches to any one executing the instrument, or employed or concerned in the preparation of it.

Q.—Your client has purchased a freehold estate with the timber upon it, and the furniture and fixtures of the mansion; and on the completion of the purchase, interest on the purchase-money is payable by him. Does the *ad valorem* duty on conveyances attach to the whole of the purchase-money and interest, or to what part of it?

A.—The amount payable for the standing timber and fixtures, being parts of the inheritance, must be included in the consideration, and the *ad valorem* duty paid thereon. And if for any reason the furniture be assigned by deed, *ad valorem* duty attaches, and its price must be stated: the furniture, however, may pass by mere delivery, and receipts may be given for it, and its price. *Ad valorem* duty will not be payable on the interest: (see Sug. Conc. V. 424 *et seq.*)

**Q.**—Explain the principle and process of the redemption of the land-tax.

**A.**—The principle now is to enable the owner of the land, and him only, to purchase the land-tax and keep it alive as a charge of which he may avail himself, and not to extinguish the tax. The process is to apply to the clerk of the Land Tax Commissioners, who supplies all the necessary forms, gives directions as to the payment of the money, and when this is done, the contract is finally delivered to the buyer properly executed: (see fully 42 Geo. 3, c. 116; 17 Vict. cc. 74, 117; 19 & 20 Vict. c. 80, s. 3.)

**Q.**—Mention by whom, and at whose expense, the following deeds and documents are usually prepared:

1. Marriage settlement.
2. Conveyance of land, by way of sale.
3. Mortgage.
4. Reconveyance when the mortgage has been paid off.
5. Conditional surrender or covenant to make it.
6. Release to trustees on winding-up of a trust, when special circumstances render a release proper.
7. Bond of indemnity.

**A.**—1. The intended wife's solicitor usually prepares the settlement, which was, previous to 33 & 34 Vict. c. 93, paid for by the intended husband (*Helps v. Clayton*, 11 L. T. Rep. N. S. 476), and this, since 37 & 38 Vict. c. 50, s. 5, would still be so.

2. The purchaser's solicitor prepares his conveyance at the purchaser's expense.

3. The mortgagee's solicitor the mortgage at the mortgagor's expense.

4. The mortgagor's solicitor the reconveyance at his client's expense.

5. The conditional surrender by the steward or mortgagee's solicitor, and covenant to surrender by the latter at the mortgagor's expense.

6. The solicitor for the trustee prepares the release at the expense of the estate. But it must be remarked that the trustee cannot insist upon a release under seal.

7. The bond, if given by vendor on account of defect of title, is at his expense: (see *Hughes' Conv.* 182, 331, 443, 569, 656, 710, &c.)

**Q.**—What instruments can be stamped after they are executed, and upon what terms?

**A.**—Agreements may be stamped within fourteen days (except agreements for letting furnished houses, not exceeding one year, which must be stamped before execution), and deeds within two months, of their date free from penalty. Policies of insurance (fire and life) within one month of execution.

By 33 & 34 Vict. c. 97, s. 15, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof on payment of the unpaid duty and a penalty of 10%, and also by way of further penalty where the unpaid duty exceeds 10% of interest on such duty, at the rate of 5% per cent. per annum, not exceeding the unpaid duty. Provided as follows: (a) Any unstamped or insufficiently stamped instrument which has been first executed at any time out of the United Kingdom may be stamped at any time within two months after it has been first received in

the United Kingdom on payment of the unpaid duty only : (b) the Commissioners (of Inland Revenue) may, if they think fit, at any time within twelve months after the first execution of any instrument, remit the penalty or penalties, or any part thereof.

**Q.**—Give a sketch of the ordinary charges of a solicitor for a purchase of a freehold estate, from the time of the purchase to the completion of the conveyance.

**A.**—The following is a sketch on a small purchase, where the solicitor elects in writing, pursuant to 44 & 45 Vict. c. 44, to charge on the old system as altered by Schedule II. of this Act ; if he does not so elect, the charges will be according to Schedule I. thereof.

	£	s.	d.
Attending you when you informed me you had purchased a plot of land at Camden Town, and produced particulars and conditions of sale, and instructed me to act for you in the matter ... ..	0	10	0
Perusing particulars and conditions of sale (or 1s. per folio) ... ..	0	6	8
Writing vendor's solicitors for abstract ... ..	0	3	6
Perusing abstract, 6 brief sheets ... ..	0	13	4
Writing vendor's solicitors for appointment to examine abstract with deeds	0	3	6
Attending with clerk to compare deeds with abstract ; engaged two hours	1	10	0
Drawing requisitions on title, fo. 13 ... ..	1	6	0
Fair copy thereof ... ..	0	4	4
Attending to deliver same ... ..	0	10	0
Perusing vendor's replies ... ..	0	6	8
Instructions for conveyance ... ..	0	6	8
Drawing same, fo. 25 ... ..	2	10	0
Fair copy for perusal ... ..	0	8	4
Writing vendor's solicitors, with draft for their approval ... ..	0	5	0
Engrossing conveyance ... ..	0	16	8
Attending to stamp ... ..	0	10	0
Paid duty and parchment ... ..			
Writing for appointment to complete ... ..	0	3	6
Writing you for purchase-money ... ..	0	3	6
Searching for judgment and <i>lis pendens</i> , Crown debts, &c. ... ..	0	10	0
Paid for certificate of search ... ..	0	5	0
Attending searching Middlesex registry (if necessary) ... ..	0	13	4
Paid search ... ..	0	2	6
Attending completion and attesting execution of deed ... ..	0	13	4
Letters, &c. ... ..	0	5	0

The usual charges for registration if in Middlesex or Yorkshire should be added.

## OF THE MODES OF TRANSFERRING PROPERTY, &c.

**Question.**—Could hereditaments in former times be conveyed to another without writing ? and if so, how ? Are any such modes of conveyance still in existence ? and if not, explain why.

**Answer.**—Previous to the Statute of Frauds, 29 Car. 2, c. 3, corporeal hereditaments could be conveyed without writing by feoffment, followed by livery of seisin ; that Act, however, by sect. 1, required, *inter alia*, all estates in lands, &c., created by livery of seisin only or by grant to be in writing, and signed by the party creating the same, or their agents lawfully authorised, otherwise they would have the force of estates at will only (Wms. R. P. 154, 13th edit.) ; and where the Statute of Frauds required writing, the 8 & 9 Vict. c. 106, now requires a deed.



**Q.**—By what means are the respective species of property usually conveyed and transferred.

**A.**—Freeholds are usually conveyed by deed of grant under the 8 & 9 Vict. c. 106, s. 2; copyholds pass by surrender and admittance; leaseholds by assignment; and personal chattels by mere delivery. (*a*)

**Q.**—What conveyances take effect by force of the Statute of Uses, and what by the Common Law?

**A.**—Those which take effect by force of the Statute of Uses are the following; Bargain and sale; Covenant to stand seised: Appointment in exercise of a power concerning uses. Those which do so by the Common Law are these: Feoffment; Grant; Gift; Lease; Exchange; Partition; Release; Confirmation; Surrender; Assignment; Under-lease; Defeasance. Besides these modes of conveyance, there are some which operate partly by virtue of the Statute of Uses, and partly by virtue of the Common Law; such are these: Feoffment to uses; Grant to uses; Statutory release: (see St. O. vol. 1.)

**Q.**—What are the four kinds of common assurances enumerated by Blackstone and other text writers? Give an example of each.

**A.**—1. By matter *in pais*, or deed; which is an assurance transacted between two or more private persons *in pais*, in the country; that is (according to old common law) upon the very spot to be transferred. 2. By matter of *record*, or an assurance transacted only in the King's public courts of record. 3. By special *custom*, obtaining in some particular places, and relating only to some particular species of property. Which three are such as to take effect during the life of the party conveying or assuring. 4. The fourth takes no effect till after his death; and that is by *devise*, contained in his last will and testament: (2 Blackstone's Com. 294, 9th edit.)

**Q.**—State the common form of assurance before the Statute of Uses.

**A.**—Before this statute a feoffment with livery of seisin was the common form of assurance: (see Will. R. P. 157, 13th edit.)

**Q.**—What is a feoffment, and is there anything, and if so what, essential to perfect it?

(*a*) By the 25 & 26 Vict. c. 53 (Land Registry Act), however, freeholds and certain leaseholds of freehold might be registered, and an indefeasible title obtained, in which case they may be conveyed or dealt with:

1. By a statutory disposition in the forms prescribed by this Act.
2. By indorsement on the land certificate.
3. By any deed or instrument by which such land if *not* registered might be conveyed or dealt with: (see sects. 63, 67, 71-3; Ayrton's L. T. Act, 112.)

But although registered land may be transferred by an ordinary deed as heretofore, yet it is provided that no unregistered estate or interest, &c., "for the registration whereof provision is made by this Act, shall prevail against the title of any subsequent purchaser for value, *duly registered*:" (see sect. 74.)

And if land on the register be conveyed by any deed, it or a (printed) copy must be sent to the registrar, and be entered on the record, and the two compared; and the original is to be stamped or indorsed, so as to give notice of the registration: (sects. 32, 75, 86, and rule 34), but no fresh registration of land under this Act can now be made. By 38 & 39 Vict. c. 87 (Land Transfer Act, 1875), freeholds and leaseholds, with twenty-one years to run, or for life or lives, may be registered, and then conveyed by the terms prescribed by the rules under the Act.



**A.**—A feoffment is properly a conveyance in fee, and yet it is improperly called a feoffment where an estate of freehold only passes: (Co. Lit. 9.) To perfect it, it must be accompanied by a formal delivery of possession, called livery of seisin: (Co. Lit. 48 a; Will. R. P. 142 *et seq.*, 13th edit.)

**Q.**—What was livery of seisin? How many kinds of livery were there? and of what property could livery be made?

**A.**—It was the formal delivery of the possession of property necessary to complete its transfer by feoffment. There were two kinds of livery—livery in deed and livery in law. It only applied to corporeal hereditaments: (see Wms. R. P. 142, 13th edit.)

**Q.**—What is the consequence of the omission of the indorsement of the livery of seisin on a feoffment? And will the omission of this indorsement be cured by lapse of time?

**A.**—The consequence is that the feoffee may afterwards be called upon to prove that livery of seisin was actually given to him. But courts of law and equity will presume livery of seisin to have been given though not indorsed on the deed, where possession has gone according to the feoffment for a length of time: (2 Sm. Comp. 674, 4th edit.)

**Q.**—Why is a feoffment no longer a necessary form of assurance?

**A.**—Because after the passing of the Statute of Uses the necessity of formal delivery of possession was dispensed with, by creating a term of years by way of bargain and sale under the Statute of Uses, which that statute executed into actual possession in the lessee without entry, who thereupon became capable of accepting a release of the property; the two instruments forming, in point of fact, but one assurance, which was called a lease and release. This mode of conveyance continued in use down to the year 1841, when an Act was passed for rendering a release as effectual for the conveyance of freehold estates, as a lease and release by the same parties. And now, by the 8 & 9 Vict. c. 106, a deed of grant is alone sufficient for the conveyance of all corporeal hereditaments: (see Will. R. P. ch. 9; see also 25 & 26 Vict. c. 53.)

**Q.**—An Act of 1845 enacts that all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be held to lie in grant as well as in livery. State the meaning and effect of this enactment.

**A.**—Before this Act an estate in possession in corporeal hereditaments could not have been conveyed by deed of grant, as they were said to lie in livery only; but, for the purpose of simplifying their transfer, they may now be conveyed by deed of grant only: (Will. R. P. 241, 13th edit.)

**Q.**—Is there any custom which enables an infant to convey, by any and what form of assurance?

**A.**—By the custom of gavelkind, every tenant of an estate of freehold (except, of course, an estate tail) is able, at the early age of fifteen years, to dispose of his estate by feoffment: (Will. R. P. 148, 13th edit.; 8 & 9 Vict. c. 106, s. 13.)

**Q.**—In what case prior to the Act 8 & 9 Vict. c. 106 (An Act to

amend the Law of Real Property) was a feoffment a necessary form of conveyance?

A.—Either by an infant in gavelkind to convey, or, if you wished to acquire a tortious fee, a feoffment was the necessary assurance; but since the above Act a feoffment has no longer any tortious operation: (Hughes' Conv. 189.)(a)

Q.—What is a deed? and what are its requisites?

A.—A deed is a written instrument under seal. The requisites are:—  
1. That the parties are able to contract; 2. That the deed be written or printed (b) on paper or parchment; 3. That the matter be legally and orderly set forth; 4. That the party whose deed it is *seal* and *deliver* it, and in most cases sign it also; 5. And, though not absolutely necessary except where the deed is executed pursuant to a power, that the deed be executed in the presence of witnesses, who shall attest the execution. Reading is also a requisite, if required: (1 St. C. chap. 16.)

Q.—May a deed be altered to any and what extent after execution?

A.—It was formerly held that any alteration, erasure, or addition, made in a material part of a deed after its execution, even though made by a stranger, would render it void; but it has now been decided that the filling in of the date of the deed, or of the names of the occupiers of the lands conveyed, or any such addition, if consistent with the purposes of the deed, will not render it void even though done by the party to whom it has been delivered after its execution: (*Aldous v. Cornwall*, L. Rep. 3 Q. B. 573.) If an estate has once been conveyed by it, the subsequent alteration, destruction, or loss of the deed will not reconvey the estate, and the deed, though cancelled, may be given in evidence to show that the estate was conveyed by it; but after the deed has become void, no action can be brought upon any covenant in it: (Will. R. P. 150. 13th edit.)

Q.—How may a deed be avoided?

A.—From what has been already stated it follows that if the deed wants any of the foregoing requisites it is void *ab initio*. It may, however, be avoided by matter *ex post facto*—1, by alteration in a material part after execution without being re-executed; 2, by breaking or defacing the seal; 3, by cancellation: (1 St. C. 494, 8th edit.)

Q.—State concisely the several parts of the ordinary form of conveyance of freeholds.

A.—They are the following: 1. The date. 2. The parties. 3. The recitals. 4. The testatum. 5. The parcels. 6. The habendum. Covenants for title are now implied, see *ante*, p. 307. The deed also must be

(a) Although feoffments were used in conveyances by corporations, it was under an erroneous notion, that as corporations could not be seised to the use of others they could not convey by deed operating under the Statute of Uses, therefore either a feoffment or a common law lease perfected by entry and followed by a release was used. A feoffment was also used to save the stamp duty of a lease for a year until 55 Geo. 3, c. 184: (see Hughes, *ubi sup.*)

(b) For the purpose of registration under the Lands Registry Act, 1862, deeds were to be printed on paper or parchment of such size as the registrar approved: (25 & 26 Vict. c. 53, s. 86, rule 84.)

signed, sealed, and delivered, and the attestation indorsed : (Hughes' Conv. 196 *et seq.* ; 44 & 45 Vict. c. 41, ss. 7 and 55.)

**Q.**—Remodel the following heads of a deed, making it as concise as possible, in accordance with the Conveyancing Act, 1881. Parties, A. of the first part, B. of the second part, Witnesseth that in consideration, &c. (the receipt, &c.), the said A. doth hereby grant and convey unto the said B., his heirs and assigns, all that messuage, &c., together with all buildings, &c., and all the estate, &c., to hold unto the said B., his heirs and assigns, to the use of the said B., his heirs and assigns for ever. Covenants by A. for himself, his heirs, executors, and administrators, with B., his heirs and assigns, for good right to convey, for quiet enjoyment, free from incumbrances, and for further assurance, and for production of deeds mentioned in schedule. Covenant by B. for himself, his heirs, executors, and administrators, with A., his heirs and assigns, not to use the house for purposes of trade.

**A.**—Parties, A. of the first part, B. of the second part, Witnesseth that in consideration, &c. (the receipt, &c.), the said A., as beneficial owner, doth hereby convey unto the said B. all that, &c., to hold unto and to the use of the said B. in fee simple. Acknowledgment by A. of B.'s right to production of deeds mentioned in the schedule. Covenant by B. with A. not to use house for purposes of trade.

**Q.**—Draw a conveyance in fee from A. to B. for valuable consideration in the simplest possible form, without recitals, and omitting descriptions of parties and parcels.

**A.**—This indenture made the                      day of                      between A. of the one part and B. of the other part, Witnesseth that in consideration of                      £. to the said A. paid by the said B., on or before the execution of these presents (the receipt whereof the said A. hereby acknowledges), the said A., as beneficial owner, hereby conveys unto the said B. all, &c., to hold the same unto and to the use of the said B. in fee simple (or fee tail). In witness whereof the parties hereto have hereunto set their hands and seals the day and year just above written. Signed, sealed, and delivered by the said A. in the presence of                      .

**Q.**—Give the shortest possible form of an effective conveyance of field A. from B., tenant therefore in fee simple, to C., on the purchase thereof by the latter for 1000£.

**A.**—The form below given in the schedule of the Act 25 & 26 Vict. c. 53, for the transfer of land registered under that Act, is the shortest possible.

Dated this                      day of                      1876.

I, A. B., of, &c., in consideration of 1000£ paid to me, grant to C., &c., and his heirs for ever, all that field A. in the parish of                      , and county of                     

Signed and sealed by B.

Witness (a solicitor or certified conveyancer),

The form given under the Land Transfer Act, 1875, is as follows :

The Land Transfer Act, 1875.

No.

Office of Land Registry.

I, A. B., the registered proprietor of the freehold land, entered in the



parties desire it; and if this be not done it is void as to him: (1 St. C. 489, 8th edit.) So also in case of a blind man it should be read over, and this should be stated in the attestation.

Q.—What is the nature of a bargain and sale; and what is necessary to perfect it?

A.—It is a conveyance by deed or other instrument in writing, (a) operating under the Statute of Uses, and founded on a pecuniary consideration, adopted when one person wishes to convey land in possession, vested remainder, or reversion, to another without livery of seisin. It is, if of freehold, perfected by enrolment: (1 St. C. 533, 535, and note, 8th edit.)

Q.—State shortly the principles upon which a conveyance by lease and release had effect.

A.—The lease for a year was made by bargain and sale, and as any pecuniary payment, however small, was considered sufficient to raise a use, the purchaser became in law at once possessed under the Statute of Uses of an estate in the land for the term of one year, as if he had actually entered under the lease. The vendor had then merely to release to him and his heirs all his (vendor's) estate and interest in the premises, and the purchaser became at once seised of the lands for an estate in fee simple: (see Will. R. P. 184, 13th edit.)

Q.—What was the Statute of Enrolments by which bargains and sales of freehold were required to be enrolled at Common Law? Explain a bargain and sale, a lease and release, and how corporeal hereditaments lie in grant.

A.—The Statute of Enrolments was the 27 Hen. 8, c. 16. As to a bargain and sale, and lease and release, see *supra*. By 8 & 9 Vict. c. 106, it was provided that corporeal hereditaments should, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery, thus doing away with the necessity of a feoffment with livery of seisin for conveyance of land, and making an ordinary deed of grant sufficient: (see Will. R. P.)

Q.—What are extraordinary conveyances, and those by matter of record?

A.—They are, first, private Acts of Parliament; secondly, royal grants: (1 St. C. 614, 8th edit.)

Q.—What is an escrow?

A.—When a deed is not delivered absolutely, but conditionally—that is, not to the grantee himself, or to some person for him, but to a third person to keep it until something is done by the grantee—it is said to be delivered not as a deed but as an *escrow*, i.e., as a scrawl or writing, which is not to take effect until the condition is performed when it becomes a good deed: (Holth. L. D., 2nd edit.)

Q.—What is a defeasance?

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(a) The words "other instrument in writing" are used because a bargain and sale of a leasehold interest for less than three years, where a rent of two-thirds of the improved value is reserved, need not be by deed nor enrolled: (1 Steph. *sup.* in *notis*.)

A.—A collateral deed made at the same time with some other principal deed or instrument, and containing certain conditions, on the performance of which the intentions of the principal deed may be defeated or rendered null and void : (1 St. O. 526, 8th edit.)

Q.—What are the objections to a deed of exchange as a mode of conveyance ?

A.—The objections were that they implied a warranty of title which in case of eviction engendered the right of re-entry, but this is no longer so : (Hughes' Pract. Sales, 247, 2nd edit. ; 8 & 9 Vict. c. 106, s. 3, *et ante*, p. 305.)

Q.—How must freehold property be conveyed by a corporation ?

A.—By deed under their corporate seal : (Hughes' Pract. Sales, 55, 2nd edit. ; and see *ante*, p. 294.)

Q.—To vest an estate in fee simple, what are the requisite words in the habendum of the conveyance ?

A.—In every conveyance (except by will) of a fee simple, the word *heirs* was necessary to be used as a word of limitation to mark out the estate ; or, in case of a corporation, *successors* : (Will. R. P. 146, 13th edit.) But since 1881 the words "in fee simple" have the same effect : (44 & 45 Vict. c. 41, s. 51.)

Q.—If a purchase deed be executed under a power of attorney from the vendor, in whose name should it be executed, and what is necessary for the purchaser to consider ?

A.—The deed should be executed in the name of the vendor, adding the words "by A. B., his attorney," unless after the 31st December, 1881, it authorises the holder to execute in his own name : (44 & 45 Vict. c. 41, s. 47.) The purchaser should satisfy himself that the vendor is living at the time of the execution by the attorney, as a power of this kind expires at the death of the principal, unless made irrevocable under 45 & 46 Vict. c. 39, ss. 8, 9 : (Sug. Conc. V. 420.)

Q.—Give a concise form in substance of an assignment of a life policy, on sale or mortgage, including the necessary power of attorney, and say if any further act is necessary to give it effect.

A.—If the form given by the 30 & 31 Vict. c. 144, be not used, they are : 1. Date. 2. Parties. 3. Recital of Policy, and agreement for sale or mortgage. 4. Testatum assigning policy on payment of purchase or mortgage money, and receipt of same. 5. Habendum. 6. Covenants by vendor that policy is in full force ; that he will not vitiate policy (other covenants for title implied.)

A power of attorney is necessary to surrender policy, or receive a cash bonus during its continuance.

If it be a mortgage, a proviso for redemption must be added ; also a covenant to pay premiums, and a power of sale, unless 44 & 45 Vict. c. 41, be relied on.

To give complete effect to the assignment, notice must be given to the assurance office : (30 & 31 Vict. c. 144, s. 3.)

Q.—State shortly the usual clauses introduced into a partnership deed.



A.—After date, &c., come 1, Mutual covenants to become partners in the business, for the term. 2. Clauses as to the title of the firm. 3. The place of business. 4. The amount, &c., of capital. 5. Who are to be the bankers of the firm. 6. As to payment of expenses. 7. Keeping the books. 8. Partners to be faithful to each other. 9. Neither partner to engage in any other trade. 10. Nor pledge credit of firm except on partnership account. 11. Nor become security. 12. To determine partnership if clauses 9, 10, or 11 are broken. 13. As to taking stock and accounts. 14. As to the division of profits. 15. Provisions in case of death of either before end of term. 16. Provision as to winding-up the business at the end or determination of partnership. 17. The usual arbitration clause, &c. : (see 2 Prid. Conv. 620, 9th edit.)

Q.—A., a merchant with capital, takes B. without capital into partnership. State the heads as to term, and generally, which you would recommend for a partnership deed.

A.—See preceding answer. As, however, the capital belongs to A., he should have interest upon it before any division of profits. It would also be well to give him a power to determine the partnership on such notice as might be agreed upon, and in case of B.'s death, the whole business should belong to A. But, of course, these provisions vary according to circumstances.

Q.—Upon a purchase of real estate for partnership purposes, to whom is it usual to have the conveyance made, and why ?

A.—The conveyance should be made to the partners, their heirs and assigns as joint tenants. The survivor can then make a good title to the premises, though in equity he will be a trustee of a share of the purchase money for the representatives of the deceased partner. When property is purchased for partnership purposes, it is, however, often usual to take the conveyance to a trustee, to the intent that he may hold the property in trust for the partners as part of the capital of the partnership: (1 Prid. Conv. 200, 9th edit.)

Q.—A., B., and C. are about to enter into partnership : A. is owner in fee simple of land ; B. holds a lease of buildings ; C. is the owner of land in copyhold tenure—these three properties are to form part of the partnership property, the agreed value of each being carried to the credit of its owner on his capital account : what will be the form of the assurances which should be executed ?

A.—A. had better grant his freeholds unto and to the use of a trustee, in trust for the partners, their heirs and assigns, as part of their partnership property. B. in like manner would assign his leasehold by indorsement on the lease, and C. would enter into a covenant to surrender his copyholds to the trustee. On any change in the partnership a declaration of trust could be executed by the trustee declaring the rights of the partners.

Q.—What are the essentials to be attended to on the execution of deeds, as well under a power as otherwise ?

A.—Where a deed was executed under a power formerly the terms of the power must have been strictly followed. But by the 22 & 23 Vict. c. 35, a deed executed in the presence of, and attested by, two witnesses,



&c., is, so far as regards the execution and attestation, a valid execution of the power, notwithstanding it was expressly required that the deed should be executed or attested with some additional or other form of execution or attestation. But if any act is to be performed, not having reference to the mere execution, it must still be done: (sect. 12.)

It is absolutely necessary to the due execution of a deed that it be *sealed and delivered*; the act of sealing must precede the delivery, and although signing is the usual practice, it is not essential at common law to the execution of a deed, and one witness is sufficient: (see 1 St. C. ch. 16.)

### ENROLMENT AND REGISTRATION OF DEEDS, &c. (a)

*Question.*—Mention the provisions of the statutes now in force in England with reference to the registration of deeds and wills, and the places to which they extend.

*Answer.*—By the Registry Acts (2 & 3 Anne, c. 4, s. 1; 5 Anne, c. 18; 6 Anne, c. 35; 7 Anne, c. 20; and 8 Geo. 2, c. 6) it is provided that all deeds and wills concerning lands, &c., in Middlesex or Yorkshire, or in the town and county of Kingston-upon-Hull, shall be registered in offices established for that purpose, and that every such deed or will shall be adjudged fraudulent and void against any subsequent purchasers or mortgagees for valuable consideration, unless as to deeds, a memorial of them be registered before the registry of the memorial of the deed or conveyance under which a subsequent purchaser or mortgagee shall claim; and unless, as to wills, a memorial of them be registered within six months after the death of the testator dying within Great Britain, or within three years after his or her death, dying on the sea or in parts beyond the seas: (see Burt. Comp. pl. 628; and see now 25 & 26 Vict. c. 53, and 38 & 39 Vict. c. 57.)

By 37 & 38 Vict. c. 78, s. 8, if the will has not been registered in proper time, an assurance by the devisee, if registered before one by the heir-at-law, will have precedence.

*Q.*—State in detail the requisites for the registration of a conveyance or mortgage in Middlesex or Yorkshire.

*A.*—The memorial must contain the date of and parties to the deed, also the parcels and habendum, and the attesting witnesses to the deed. It must be under the hand and seal of either the grantor or grantee, or his heirs, executors, or administrators, and be attested by two witnesses, one of whom must have attested the execution of the deed; and he must prove upon oath the execution of the deed and memorial: (see Sug. Conc. V. 377, &c.)

*Q.*—What lands or instruments are exempted from the above-mentioned Registry Acts?

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(a) The registration treated of in this chapter has no reference to registration under the 25 & 26 Vict. c. 53, or 38 & 39 Vict. c. 87. And we must add that the provisions of the Acts of Anne and Geo. 2, above set out, are to cease to be applicable to any land in Middlesex and Yorkshire whilst the land is upon the register under the provisions of the above Acts.

A.—After date, & the business, for the place of business, the bankers of the books. 8. to engage in a partnership or partnership if accounts, death of business arbitra

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... and law of real and personal property.

... and leases not exceeding ... the Inns of Court and ... (a)

... that the memorial of a deed ... by one of the ... of the deed by a granting party, or can the ... of these formalities?

... that the memorial should be executed ... under the hand and seal of the grantor ... that one of the witnesses who attested ... (Sug. Conc.

... that a deed of appointment under a power of a ... should be registered or not?

... it should be registered, unless it comes within ... (Sug. Conc. V. 577; *Scrifton v. De Quincey*, ...)

... Will a person buying an estate in a register county, with notice of ... not registered, be bound by such incumbrance?

... Yes, he will be bound by it: for if he has notice he has got all ... (St. Eq. § 497.)

... If deeds relate to estates in a register county, when should such ... be registered, and what would be the consequence from delay in ...?

... As no time is limited by the Registry Acts for registering deeds, ... they should be registered immediately after execution where the deeds ... relate to estates in a register county; because, if a subsequent purchaser ... or mortgagee for valuable consideration register first, and without notice ... of the prior conveyance, the subsequent purchaser or mortgagee would ... prevail over the first vendee or mortgagee: (see Sug. Conc. V. 577.)

... Is the non-registry of a lease cured by registering an assignment ... in which the lease is recited, or not?

... The registering of the assignment in which the lease is recited does ... not cure the non-registry of the lease: (Sug. Conc. V. 578.)

... In a register county, where the vendor of real estate is both heir- ... at-law and devisee, is it material that the will should be registered, and is ... it material if he should be devisee only?

... If the vendor is both heir-at-law and devisee, registration of the ... will is immaterial; for, if he sell to any subsequent purchaser, it must be ... either in the character of heir-at-law or in the character of devisee. If ... he sell in this character, the second purchaser must have notice of the ... will; if he contract in that, the first purchaser has already procured the ... legal estate. But if the vendor be devisee only, the will should be regis-

(a) The city of London is not within the county of Middlesex for registration purposes.

tered: (1 Sug. V. & P. 550, 9th edit. ; see 37 & 38 Vict. c. 78, s. 8, *ante*, p. 324, if the will is not registered in due time.)

**Q.**—If a vendor claim leasehold estate in a register county as executor or legatee, can a purchaser from him insist upon the will being registered in either case? And state a reason.

**A.**—It seems clear that, if the vendor of leasehold estate is either executor or legatee, the purchaser need not insist upon the will being registered, because no subsequent purchaser can procure a title without notice of the will: (see 1 Sug. V. & P., *ubi sup.*)

**Q.**—If an estate lie in a register county, is a purchaser in any and what cases entitled that a will should be registered?

**A.**—If an estate lie in a register county, a purchaser from a devisee should not complete his contract till the will is duly registered, unless the vendor be both heir-at-law and devisee, or the estate is leasehold and the seller is either executor or legatee, or the term is expired: (see 37 & 38 Vict. c. 78, *sup.*; see Sug., *ubi sup.*)

**Q.**—What kind or description of deeds require enrolment to give them validity; and within what period from their date and execution must they be enrolled?

**A.**—A bargain and sale of freehold requires enrolment to give it validity, which enrolment must be made within six months (which means lunar months) from the date, in one of the courts of record at Westminster, &c.: (27 Hen. 8, c. 16.) A disentailing assurance must also be enrolled in Chancery within six calendar months after execution: (3 & 4 Will. 4, c. 74, s. 41.) So conveyances under the Statute of Mortmain must be enrolled within six months from their execution: (9 Geo. 2, c. 36.)

**Q.**—What would be the consequence of the omission to enrol a bargain and sale within the proper time?

**A.**—The omission to enrol the deed within the proper time will render it inoperative: (2 Hughes' Pract. Sales, 159, 2nd edit.; Hughes' Conv. 189.)

**Q.**—In what case is enrolment essential to the validity of a grant of an annuity for life or lives?

**A.**—It is now no longer necessary to enrol them in any case, as the 17 & 18 Vict. c. 90, repealed the statute which required their enrolment. But if registered in a similar manner to a judgment, they are a charge on the lands in the hands of the purchaser thereof: (see 18 Vict. c. 15, s. 12.) Annuities given by will or settlement, however, are exempted from this Act: (sect. 14; and see Hughes' Conv. 164.)

**Q.**—State the general effect of the statute 27 Hen. 8, c. 16, called the Statute of Enrolment, and to what species of deed it applies.

**A.**—This statute requires every *bargain and sale* of any estate of inheritance or freehold to be made by deed indented, and enrolled within six months from the date in one of the courts of record at Westminster, or before the *custos rotulorum* and two justices of the peace and the clerk of the peace for the county in which the lands lie, or two of them at least,

whereof the clerk of the peace should be one: (see Will. R. P. 187, 13th edit.)

### SETTLEMENTS.

*Question.*—What is understood by the term voluntary settlement?

*Answer.*—Conveyances or settlements made without any consideration whatever, or even those made for *good*, though not for valuable consideration, are said to be *voluntary*: (see 1 St. C. 495, 8th edit.; St. Eq. § 425, &c.; Hughes' Conv. 601.)

*Q.*—What are the different kinds of consideration to support a voluntary settlement or conveyance?

*A.*—The consideration known as a good consideration will support a voluntary conveyance as between the parties themselves (St. Eq. § 426, &c.); although not as against purchasers or mortgagees for value, or creditors: (13 Eliz. c. 5; 27 Eliz. c. 4; *Twyne's case*, 1 Sm. L. C. 1.) A covenant by the voluntary grantee to discharge mortgage debts, &c., on the estate, is a sufficient consideration to take the grant out of the 27 Eliz. c. 4: (*Townsend v. Toker*, 11 L. T. Rep. N. S. 531, L.JJ.)

*Q.*—Is a voluntary settlement good against a purchaser or mortgagee for a valuable consideration with notice of such settlement? (a)

*A.*—The settlement is void as against a purchaser or mortgagee for valuable consideration, although he has notice of it: (see 27 Eliz. c. 4; *Goodright v. Moses*, 1 Bl. 1019; Sug. Conc. V. 566.)

But if a purchaser *has notice* of a gift to a charitable use he takes subject to it, though, if he has no notice, he will have the same protection as in the case of an ordinary voluntary conveyance: (Sm. Man. sect. 195.)

*Q.*—Is a purchaser for a *good* consideration from a voluntary grantee in a better situation as to title than the voluntary grantee?

*A.*—He is not. His title may still be defeated by a sale to a *bonâ fide* purchaser for *valuable* consideration: (see *Doe d. Newman v. Rusham*, 21 L. J., N. S. 139, Q. B.; *Humphreys v. Pensam*, 1 Myl. & Cr. 580.)

*Q.*—A father made a voluntary conveyance of land to his son John, subject to his own life interest, and afterwards made a like voluntary conveyance of the same land to his son William, who forthwith sold his reversion for valuable consideration to a purchaser. Who will take the land on the father's death, and why?

*A.*—A voluntary conveyance is binding on the grantor and on all persons claiming under him, other than purchasers for value. Hence, after the father had conveyed to John, he had no estate left in him which he could convey to anyone but a purchaser; and as nothing, therefore, passed to William, his purchaser could be in no better position, and John takes the estate: (2 Prid. Conv. 192, 9th edit.)

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(a) Also asked thus: A., an owner in fee simple, makes a voluntary settlement of his real property. He subsequently sells and conveys a portion for valuable consideration to a purchaser with notice of the settlement. Which will hold good—the settlement or the conveyance? Give reasons.

**Q.**—Will a voluntary settlement of all, or which, of the following classes of property be void as against a subsequent purchaser for value, viz. :—(a) real estate ; (b) chattels real ; (c) pure personalty ?

**A.**—(a) Under the 27 Eliz. c. 4, this would be void. (b) And this statute extends to chattels real : (Co. Litt. 3 b ; 6 Rep. 72. See *Price v. Jenkins*, L. Rep. 4 Ch. Div. 483 ; *Ex parte Hillman*, 10 Ch. Div. 622.) (c) This settlement would be good, as the statute does not apply to pure personalty : (2 My. & Keen, 512.)

**Q.**—A. seised in fee of an estate, and wishing to provide for B., conveys it to trustees by voluntary settlement upon trust for himself for life, with remainder to the use of B. and his heirs, and without reserving any power of revocation ; he quarrels with B. and wishes to revoke the settlement. Can he do so, and if he can, how can he do it ? And have the trustees of the settlement any duty in the matter ?

**A.**—A. cannot revoke the settlement, but he may defeat it by conveying to a *bond fide* purchaser for value : (27 Eliz. c. 4.) The trustees in the case put are mere conduit pipes, and have no interest or duty whatever.

**Q.**—Under what circumstances does a voluntary conveyance cease to be a flaw in a title ?

**A.**—When the voluntary grantee conveys to a *bond fide* purchaser for value ; or if a person is induced to marry the voluntary grantee, on account of the settlement : (Sug. Conc. V. 569 ; *Prodgers v. Langham*, 1 Sid. 133.)

**Q.**—So far as a voluntary settlement is voidable under the statute of Elizabeth, state under what circumstances of indebtedness, and in respect of its existing at the time or arising subsequently, such a settlement is liable to be set aside ; and does the law extend to a settlement of personal as well as real estate ?

**A.**—All voluntary settlements made by one who, at the time, or shortly afterwards is indebted to such an amount that he has not sufficient to pay his debts, are, by the 13 Eliz. c. 5, void as against such creditors : (2 Sm. Comp. 839, 840, 4th edit. ; *Barling v. Bishop*, 2 L. T. Rep. N. S. 651 ; *Ware v. Gardner*, L. Rep. 7 Eq. 137.)

The Act speaks of “lands, tenements, hereditaments, goods and chattels” (s. 1), and it seems that “goods and chattels” now include all kinds of personal property : (Will. P. P. 337, 10th edit.)

**Q.**—In what case can or cannot a settlement of land made after marriage upon a wife and children be set aside ?

**A.**—If the settlement be made in pursuance of articles entered into prior to the marriage, it will be as binding as if made before marriage, and cannot be set aside in favour of purchasers or creditors, for marriage is a valuable consideration. But if not so made it is a mere voluntary settlement, and may, as above stated, be set aside in favour of creditors (a)

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(a) Under certain circumstances future creditors are within the 13 Eliz. c. 5 : (see *Barling v. Bishop*, 2 L. T. Rep. 651 ; *Ware v. Gardner*, L. Rep. 7 Eq. 317.) In order to entitle a creditor of a living debtor to set aside a fraudulent conveyance under the 13 Eliz. c. 5, it is not necessary that the creditor should have any lien or charging order on the property comprised in the conveyance ; but in the absence of such lien

and of *bond fide* purchasers, &c.: (13 Eliz. c. 5; 27 Eliz. c. 4; 2 Prid. Conv. 192, 9th edit.) (a) If the settlor be a trader and becomes bankrupt the settlement is void under the circumstances stated in note *suprà* and in next answer.

Q.—In what case will a voluntary settlement be void as against the creditors of the settlor? And is there any and what difference in this respect between the case of a trader and a non-trader?

A.—First. Under 13 Eliz. c. 5, as against creditors at the time, if made when in insolvent circumstances, or with a view to insolvency.

Second. Under sect. 47 of the Bankruptcy Act, 1883, any *voluntary* settlement of property, unless of his wife's property, shall, if the settlor become bankrupt within two years after the date of the settlement, be void against the trustee of the bankrupt; and if the settlor become bankrupt at any subsequent time within ten years it shall also be void against such trustee, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof. There is now no difference between a trader and a non-trader, but the corresponding provision of the old law was confined to *traders*: (see sect. 91 of the Bankruptcy Act, 1869.) As to policies effected after marriage for benefit of wife, husband, or children, see sect. 11 of Married Women's Property Act, 1882.

Q.—What is understood by "uses in strict settlement?"

A.—When estates are limited to the use of the parent for life, and after his death to the use of his first and other sons successively in tail, the uses are said to be in strict settlement: (1 St. C. 328, 8th edit.)

Q.—To what extent can real property be settled without violating the rule against perpetuities?

A.—During the existence of a life or lives in being, and twenty-one years after. It may, therefore, be settled upon an unborn child, but not upon the child of an unborn child: (*Cadell v. Palmer*, Tud. L. C. Con. 321; Will. R. P. 52, 13th edit.)

Q.—State and explain the laws against perpetuity. How is the duration of powers of sale and exchange attached to the settlements governed by these laws?

A.—The policy of the law is now in favour of the free disposition of all kinds of property, and, as it allows estates tail to be barred, so it will not permit the object of an entail to be accomplished by other means, any further than can be done by giving estates to the unborn children of

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the court will not apply the property in satisfaction of the creditor's claim. And it seems an action to set aside such a conveyance ought to be on behalf of all the creditors of the debtor: (*Reese River Silver Mining Company v. Atwell*, L. Rep. 7 Eq. 347.)

(a) But care must be taken to distinguish between a mere voluntary conveyance and a *purchase* taken in the name of the purchaser's wife and children, the latter of which is not considered to be within the meaning of the 27 Eliz. c. 4, and therefore cannot be defeated by a subsequent *bond fide* purchaser for valuable consideration: (Sug. Conc. V. 567.)



living persons. So that lands can no longer be tied up or fixed as to their future destination for a longer period than the lives of existing persons and a term of twenty-one years after their decease, allowing for gestation if it exists: (*Cadell v. Palmer*, 7 Bligh N. S. 202 ; Will. R. P. 52, 13th edit.) Powers of sale and exchange, being general powers, have no tendency to a perpetuity and are not affected by the rule.

*Q.*—By marriage settlement dated in 1821 real estate was settled to the use of the settlor, A., for life, and after his death to the use of all or any exclusively of the children, grandchildren, or other issue of A. (to be born before the appointment was made) as he should by deed or will appoint, and in default to the uses therein declared. By will dated in 1867, A. appointed the estate to his son, B, in fee, but if B. should have no child who should attain twenty-one, then to the settlor's grandson, C., in fee. On the death of A., how does the land devolve, and why?

*A.*—These were the facts in *Re Brown and Sibley's contract*, 3 Ch. Div. 156 (where it was held that the executory devise over to C. was void, as infringing the rule against perpetuities, and that B. took the estate in fee): (see also *Re Ridley-Buckton v. Hay*, 11 Ch. Div. 645.)

*Q.*—When a trustee appointed by deed or will has not accepted office and is desirous of disclaiming the trust, what must he do in order to divest himself of the estate, and where personalty is bequeathed to executors as trustees, is renunciation of the executorship of itself a disclaimer of the trust?

*A.*—In the first instance the trustee must disclaim by deed. The probate of the will is an acceptance of the trusts (*Michlow v. Fuller*, Jac. 198), and where personalty is given on trust to the executors *as such*, it would seem that their renunciation of that character ought to operate as a disclaimer of the trusts: (See *Stacey v. Elph*, 1 M. & K. 195 ; see also *Re Gordon's Estate*, 46 L. J. 794, Ch., in case of realty, but separate disclaimers are still often executed.)

*Q.*—If in a strict settlement a power of sale and exchange be given, not expressly limited in its duration, is it valid? and, if so, during what period and state of circumstances will it continue?

*A.*—The power is valid, and will continue until the remainder or reversion in fee falls into possession, and then it determines. Formerly it was held that the power must have been exercised within the time allowed by the rule against perpetuities; but this appears to be no longer law: (*Burt. Comp.* pl. 789 n. ; 1 Sug. Pow. 471, 472, 7th edit.)

*Q.*—Where a manor forms part of a settled estate, who is entitled to (a) Fines on admission to copyholds held of the manor? (b) Payments on enfranchisement? and why?

*A.*—(a) Fines belong to the tenant for life, being considered as income. (b) Payments on enfranchisements must be invested as directed in the settlement, and if no direction there, if the sum exceeds 200*l.* it must be paid into the Bank of England until applied by order of the court in the purchase or redemption of the land tax, or towards the discharge of debts or other incumbrances affecting the manor, or in the purchase of other lands to be settled to the same uses: (4 & 5 Vict. c. 35, s. 73 ; 15 & 16 Vict. c. 51.)



**Q.**—How should you advise the trustees of a marriage settlement to deal with an immediate cash bonus, declared upon a policy of life insurance, included in the settlement?

**A.**—The court usually considers every bonus as part of the capital unless it appears to be nothing more than an increased dividend, arising from increased profits either of the current year or of any given number of years. In such last cases the bonus belongs to the tenant for life. In all other cases, in the absence of any special provision to the contrary, the bonus ought to be invested upon the trusts of the settlement, and the income only paid to the tenant for life: (Will. P. P. 11th edit. 311.)

**Q.**—A., in his marriage settlement, covenants to pay to the trustees after the marriage 1000*l.* on demand. From what date does the Statute of Limitations begin to run in his favour?

**A.**—This is a mere specialty debt, and the statute will begin to run from the date of the marriage: (see *Norton v. Ellam*, 2 M. & W. 461; *Stone v. Stone*, L. Rep. 5 Ch. App. 74.)

**Q.**—May minerals, with right to work them, be excepted by trustees of a settlement out of a conveyance of land in fee and remain distinct property? What amendment of the law on this point, as to certain sales or dispositions, has been made by a recent statute?

**A.**—The trustees may, unless expressly forbidden by the trust deed, with the sanction of the Court (Chancery Division), obtained on petition, sell or exchange the lands, reserving the minerals, with or without power of working them, &c., or may, in like manner, sell the minerals apart from the lands: (25 & 26 Vict. c. 108, s. 2.) And sales, &c., by trustees, heretofore made, reserving minerals without express power, are not to be invalid, unless declared so by a court of competent authority, &c.: (sect. 1.) Before this Act it was held they could not do so: (*Buckley v. Howell*, 29 Beav. 546.)

**Q.**—By the Act called the Trustees and Mortgagees Act, passed 28th August, 1860, in all cases where by deed, will, or other instrument of settlement, executed after the passing of the Act, a power of sale is given, there being given by the Act authority to exercise such power of sale in the way, under the restrictions, and with the powers therein mentioned. Describe in a general way the powers and authorities given by the Act.

**A.**—Where the will, deed, or settlement authorises a sale the trustees may sell, either together or in lots, by public auction or private contract, and at one or several times, and may insert special stipulations as to title, &c., in the conditions or contract of sale; also power to buy in, rescind contracts for sale and resell and convey: (see 23 & 24 Vict. c. 145, ss. 1, 2, and 3; and see also 44 & 45 Vict. c. 41, s. 35, as to instruments coming into operation after 1881.)

**Q.**—What are the statutory powers and indemnities given to trustees of marriage settlements which are usually incorporated in settlements, and which omitted?

**A.**—Although trustees have power by statute to invest in many securities, to give receipts in most cases, and to appoint new trustees in a great variety, it is still usual to incorporate these powers in the settlement. The ordinary trustee indemnity clauses are not now usually inserted, nor

the enlarged powers of sale or exchange where a prior power of sale or exchange has been given, nor the powers of maintenance out of income.

**Q.**—What special provision should be made for the protection of trustees in a settlement comprising a policy of insurance, and covenants to pay premiums, and to pay a sum of money at a future time?

**A.**—A proviso should be inserted giving power to the trustees to apply the interest and capital of the trust funds in keeping up the policy, or any fresh policy taken out in lieu thereof, and that the trustees shall not be liable on account of the policy not being kept up: (3 Davidson's Conveyancing, part 2, p. 811.) Where there is a covenant by the husband to pay a sum of money at a certain time after marriage, protection should be given to the trustees not enforcing payment until after the wife's death, unless she requires them to do so. If the covenant is for payment after the husband's death there should be a proviso for the extension of the trustee's power, so as to give receipts to payments by anticipation: (Davidson, vol. 3, part 2, p. 866.)

**Q.**—A. B., a barrister in considerable practice, on his marriage with C. D., proposes to settle 10,000*l.* The father of C. D. gives her 5000*l.* as a marriage portion. Upon what trusts would you advise that these sums should be settled?

**A.**—The 5000*l.* of C. D. should be vested in trustees in trust to pay the interest, &c., to her for life for her sole and separate use and upon her sole receipt, but without power of anticipation; and after her death in trust for her husband (A. B.) for life. And after the decease of both, in trust for the children of the marriage as husband and wife, or the survivor, should have appointed; and in default of and subject to appointment, in trust for children of marriage, sons at twenty-one, daughters at that age or marriage, in equal shares, subject to hotchpot; but if only one child the whole to him or her, and if no children, in trust as wife should appoint, or for next of kin of wife. (a)

The 10,000*l.* of A. B. should be vested in trustees in trust to pay interest, &c., to him for life; then in trust for wife (C. D.) for life or until remarriage. After which in trust for children of marriage as A. B. should have appointed, and in default in trust for children as before. The ultimate trusts in this case being to husband's next of kin: (see 2 Prid. Conv. 181-8, 9th edit.)

**Q.**—A gentleman has several children, all infants, the eldest of which is of weak mind. The gentleman and his wife have power to appoint by deed their marriage settlement fund, amounting to 20,000*l.*, to all or any one or more exclusively of the others of their children, the husband or wife surviving having a like power of appointment by deed or will. The gentleman has 12,000*l.* of his own, and desires to make some provision for the eldest child, how would you advise him to do this, having regard to the child's state of mind?

**A.**—I should advise him to settle a portion of his 12,000*l.* upon trusts

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(a) This question is answered by the above: You are instructed to prepare the marriage settlement on the marriage of a client, and the property to be settled consists of money in the funds belonging to the wife. State the general provisions which should be made by the settlement in such a case.

for the benefit of the eldest child. The funds subject to the settlement can be appointed to the exclusion of the eldest child, as this would be within the terms of the power.

*Q.*—Specify the clauses and provisions you would insert in a marriage settlement (after the limitations in favour of the husband and wife and the issue of the marriage) *in the order in which they should stand.*

*A.*—After the limitations come clauses of maintenance, accumulation and advancement. And in default of issue property to be in trust for husband (if it be his property), his executors, administrators, and assigns. Power to appoint new trustees. Declaration that settlement to be void if marriage not solemnised within twelve months: (2 Prid. Conv. 184, 9th edit.) (a)

*Q.*—What are the usual powers given to tenants for life and settlement trustees respectively in a large settlement of real estate, comprising building land, houses, farms, and mines, the property being partly freehold and partly copyhold?

*A.*—Power is given to the tenant for life, and after his death to the trustees, to lease the freeholds for terms not exceeding twenty-one years for agricultural leases, or ninety-nine years for building leases, or sixty years for mining leases or repairing leases. To the trustees, powers of sale and exchange, and to invest moneys in other lands. Powers to give receipts and to appoint new trustees. With respect to the copyholds the husband covenants to surrender them to the use of the trustees, upon trusts to correspond with the uses of the freehold, and to hold the same until surrender, subject to the same trusts and powers: (see Dav. Prec. in Con., vol. 3, part 2, p. 862 *et seq.*) By the Settled Land Act, 1882, powers of sale, exchange, and leasing are given to a tenant for life under the regulations contained in the Act.

*Q.*—How are the rights of an assignee for value of the interest of a tenant for life protected against any improper exercise of the powers conferred on the latter by the Settled Land Act, 1882.

*A.*—By sect. 50 (3) the tenant for life may not exercise his powers to the assignee's prejudice, and his rights are not to be affected without his consent, except that when the assignee is not in possession the tenant for life may grant leases under the regulations of the Act.

*Q.*—A lady possessed of a large amount of personalty is about to marry. What advice would you give her as to the best settlement of her property?

*A.*—As an ordinary rule, I should advise her to settle it upon trust for herself for life for her separate use without power of anticipation; then to her husband for life, or until he became bankrupt or compounded with his creditors or otherwise assigned or charged it or execution issued against him; then upon trust for him and the issue of the marriage as the trustees in their discretion might think fit; then to the issue of the marriage as the husband and wife by deed or the survivor, by will, or deed might appoint; in default of appointment, to children equally; in default of issue,

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(a) Powers of maintenance, &c., out of the income of trust property, are given by 44 & 45 Vict. c. 41, s. 48, and power to appoint new trustees by sect. 31.

as the wife by will or deed might appoint; in default of such appointment, to wife's next of kin.

**Q.**—If you were concerned in the foregoing case for the husband, who was not himself possessed of any fortune, what stipulations could you reasonably maintain in his interest?

**A.**—On behalf of a penniless husband, I should ask for the first life interest (protected as above) in some portion of the wife's property, and that, on the written request of the husband and wife, the trustees might advance, on the husband's personal security, part of the trust funds, for the purpose of advancing the husband in any way that might be deemed advisable.

**Q.**—Upon an intended marriage, it is proposed that the income of the personal property of the wife should be settled upon the husband for life, if it can be secured against being affected by any assignment or charge which he may make, and against his creditors. Can this be effectually guarded against and how?

**A.**—This may be done by vesting the estate in trustees, upon trust to permit the husband to receive the income until he should make or execute any assignment or charge thereof, or until he become bankrupt, or his estate become vested in any other person, or an execution issue against him or his goods, or die, with limitations over in favour of the wife or family on the happening of any of the events named: for marriage is a valuable consideration: (see 2 Prid. Conv. 181, 9th edit.)

**Q.**—If the personal property to be settled belong to the husband, and the first life interest be reserved to him, can that be secured against the assignment, charge, or incumbrance referred to in the preceding question?

**A.**—It cannot, being considered as a fraud upon the bankrupt laws: (*Lester v. Garland*, 5 Sm. 205; Flath. Arch. Bk. 314, 11th edit.)

**Q.**—On a proposed marriage, where the intended husband is seised in fee of real estate, of the annual value of 1000*l.*, and the intended wife's fortune is 10,000*l.*, what would be the usual and proper settlement of the intended wife's fortune, and of the husband's real estate?

**A.**—The real estate of the intended husband would be vested in trustees to the use of the husband for life, with an allowance for pin money for the wife, and a rentcharge or annuity by way of jointure if she should survive her husband. Subject to this, and to the payment of portions for younger children, the realty is settled upon the first and other sons successively in tail, and then to the daughters as tenants in common in tail, with cross-remainders between the daughters, the ultimate limitation being to the husband in fee. The 10,000*l.* should be settled as stated, *ante*, p. 344: (2 Prid. Conv. 181, &c., 9th edit.)

**Q.**—Where a strict settlement is made and portions provided for "younger children," under what circumstances would a second son, taking the estate by virtue of the settlement, be also entitled to a share of the sum provided for portions?

**A.**—The general rule is that, unless there is a strong presumption to the contrary, a son who at any time before his father's death becomes

entitled to the estate, shall not have any share in the portions fund, even though an appointment of part of it has been already made in his favour: (Deane's Conv. 2nd ed. p. 407.)

Q.—What is pin money, and to what extent is it recoverable if the payment is in arrear?

A.—Pin money (*a*) is a sum payable by the husband to the wife in virtue of a particular engagement, to be applied by the wife in attiring her person, and defraying other expenses, in a manner suitable to her husband's rank. Only one year's arrears can be recovered by the wife, and no arrears by her representative (St. Eq. § 1375 a, and note); but it seems doubtful now whether any arrears can be recovered from the husband's estate: (see *Howard v. Digby*, 2 Clark & Finnelly, 634; Haynes' Outlines, 3rd edit.)

Q.—Real property in strict settlement. The eldest son of the tenant for life is of age and about to marry. What resettlement is usually made? What deeds are necessary?

A.—The eldest son executes a disentailing deed with consent of his father (the protector), and the latter assigns his life interest to such uses as the father and son may jointly appoint, and subject thereto to the uses of the settlement. And by the son's settlement the father and son appoint the estate to the use of trustees: (see *post* and Green Conv. 92, 93; *Ld. St. Leonards' Handy Book*, 6th edit. 115, 116.)

Q.—By settlement A. is tenant for life, remainder to his eldest son B. in tail, remainders over. It is wished to bar the entail, and resettle the estate, the father consenting as protector. Should the father's life estate be reserved to him, or should he take a new life estate, and what would be the ordinary uses on a settlement?

A.—The father's life estate should not be reserved to him; but on the resettlement a new life estate should be given him. The disentailing assurance provides that the resettlement shall be to such uses as the father and son may jointly appoint (which uses are set out in next answer), and subject thereto to the uses of the original settlement: (Green Conv. 92, 93, 111; 2 *Prid. Conv.* 560, 9th edit.)

Q.—Supposing this was to be done on the marriage of the son, what would be the uses in strict settlement, and what the powers of jointuring and raising portions, &c.?

A.—By the son's settlement the father and son should appoint the estate to the use of trustees to secure an annuity to the son during the joint lives of himself and father, and after his death to secure his wife's jointure; subject thereto, to the use of the father for life, remainder to the use of the son for life, remainder to the use of the trustees for a term, to raise portions for the younger children of the son, remainder to the use of the son's first and other sons in tail, remainder to his daughters in tail, with cross-remainders between the daughters, remainder to the use of the

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(a) The origin of this expression is thus stated: Catherine Howard, one of the queens of Henry VIII., introduced pins from France, and as they were very expensive at that time, a separate allowance for this new luxury was granted to the ladies by their husbands. Hence the expression "pin money:" (see *Collier's Hist. Brit. Emp.* 195.)

father's second and other sons in tail, &c. : (see Green Conv. 92, 93 ; *Ld. St. Leonards' Handy Book*, 115, 116, 6th edit.)

**Q.**—What words of limitation would you use in a settlement, by deed, of freehold estates for the purpose of creating estates tail in the sons of A. and B., his wife successively, according to seniority, with remainders to the daughters of A. and B., as tenants in common in tail, with cross-remainders between such daughters in tail ?

**A.**—The settlement should run : To the use of the first son of the body of the said A. by the said B., and the heirs of the body of such first son issuing ; and in default of such issue to the use of the second and every other son of the body of the said A. by the said B. severally, successively, and in remainder, one after another, in order and course as they shall respectively be in priority of birth, and the heirs of the body and respective bodies of all and every such son and sons issuing, the elder, &c., to take before the younger, &c. ; and, for default of such issue, to the use of all and every the daughter and daughters of the body of the said A. by the said B., if more than one, to be equally divided between them as tenants in common, and of the respective heirs of the body and bodies of each and every daughter and daughters issuing. And if any or either of such daughters shall die without lawful issue of her or their body or respective bodies, then as to her part or share to the use of the survivors or survivor of the said daughters or daughter, to be equally divided between them, if more than one, as tenants in common, and of the respective heirs of their bodies issuing ; and in case all the daughters but one die without issue of their bodies, then to the use of such surviving daughter and the heirs of her body issuing : (see *Bart. Conv.* vol. 7.) (a)

**Q.**—In what manner would you by the same deed settle leasehold estates (held for a term of years) for the benefit of the same persons as are named in the previous question, and for the same estates (so far as the different nature and tenure of the property will allow), and with same priority ?

**A.**—There can be no estate tail in leaseholds, therefore they must be vested in trustees upon trust to pay the rents, &c., to the first son of the body of the said A. by the said B. who shall live to attain twenty-one, and the heirs of the body of such son issuing, and after the decease of such first son under twenty-one without issue of his body begotten at his decease, in trust, &c., for the second and every other son of the body of the said A. by the said B., who shall attain the age of twenty-one years, and as and when they severally, successively, and in remainder one after another in seniority of age and priority of birth, &c., with a proviso, that, notwithstanding the postponement of the legal interest in the children, they shall nevertheless be entitled to the income thereof during minority. And in default of such issue in trust, &c., for the daughters and the heirs of their bodies as tenants in common, and if any of the daughters die without issue then her original share so vested in her to be in trust for the survivors as tenants in common, and for the heirs of their bodies issuing : (see 7 *Bart. Conv.* 632, 635, *in notis.*)

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(a) A short form of settlement is given in the fourth Schedule to 44 & 45 Vict. c. 41.



**Q.**—Set out the habendum of a settlement of lands, according to the form of which only females descended from females can take.

**A.**—To have and to hold the hereditaments and premises hereby granted unto said (trustees) and their heirs. To the use of A., the wife, for life, for her separate use, and after her death to the use of the first daughter and the heirs female of the body of such first daughter issuing, and in default of such issue, to the use of the second and every other daughter of the said A. and the heirs female of their bodies respectively, severally and successively in priority of birth.

**Q.**—Give in outline the trusts of a sum of stock, settled so that the income may, as far as possible, be enjoyed by the person taking for the time being the rents of the land settled, as in the preceding question.

**A.**—The stock must be vested in trustees; and, if settled by the same settlement, upon trust to pay the dividends, &c., to the person for the time being entitled to the rents of the real estate for her separate use, with a provision that it should not vest absolutely in a tenant in tail by purchase unless she attained twenty-one; but if settled by another instrument, upon trust to pay the dividends to A. for life for her separate use, then to the first daughter of the said A. attaining twenty-one.

**Q.**—By a marriage settlement a sum of money is to be raised for younger children of the marriage; state the usual mode by which this is effected.

**A.**—By means of a long term of years vested in trustees: (Will. R. P. 412, 13th edit.)

**Q.**—In a settlement of real and personal estate, what powers would you recommend to be given to the trustees with regard to each kind of property?

**A.**—In a settlement of real estate the powers given to trustees (irrespective of the 23 & 24 Vict. c. 145, and 44 & 45 Vict. c. 41) are to distrain for the wife's jointure; to sell and repurchase, and to invest moneys arising from the sale until repurchase; to make exchanges; to raise portions for younger children; to make leases, give receipts, and appoint new trustees: (2 Prid. Conv. 299, &c., 9th edit.)

In settlements of personal estate the powers usually run thus: to invest the property in Government or real security, and vary the investment, if necessary, and for advancement of children. And when bonds or other personal securities are assigned: powers to sue and give receipts for, compound, and compromise the same; also to refer to arbitration disputes respecting them, and to appoint new trustees: (see Hughes' Conv. 371, &c.)

**Q.**—Trustees having power to invest trust moneys in land, propose to make a purchase. What precautions would you take on behalf of the trustees?

**A.**—I should first advise the trustees not to purchase land, but only invest on mortgage. But if they be authorised to purchase, I should see that the power was strictly followed; that the estate bought was of ample value, free from all prior incumbrances, and settled to the uses directed by the will or settlement, &c., and in fact take such precautions as would free them from any loss, &c., that might arise, and yet act in the most beneficial manner for the *cestui que trust*.



**Q.**—Have the devisees in trust for sale under a will, under any, and what circumstances power to mortgage?

**A.**—As a general rule the trust for sale out and out for a purpose or with an object beyond the raising of a particular charge does not authorise a mortgage, but where it is one for raising a particular charge, and the estate is settled or devised subject to that charge, there it may be proper under the circumstances to raise the money by mortgage, which will then be supported as a conditional sale: (Dart's V. & P. 77, 5th edit.)

**Q.**—Are there any and what legal or equitable means of binding the real property of an infant, on his or her marriage, so as to insure a settlement being made on his or her attaining twenty-one? And can an infant tenant in tail, or an infant having a power of appointment over property, make a valid settlement in all events? And, if not, state the events upon the happening of which the settlement would be void.

**A.**—An infant may now, upon, or in contemplation of marriage, with the sanction of the Court (Chancery Division), (obtained on petition), make a valid settlement, or contract for a settlement, of his or her real or personal estate, which is as effectual as if the infant were of full age. But this section does not extend to powers which it is expressly declared shall not be exercised by an infant: (18 & 19 Vict. c. 43, ss. 1, 3.)

It is also provided that if any power of appointment, or any disentailing assurance, be executed by an infant tenant in tail under the provisions of this Act, and such infant afterwards die *under age*, such appointment or disentailing assurance shall become absolutely void: (sect. 2.) The Act does not apply to male infants under twenty years, or to female infants under seventeen years: (sect. 4.)

**Q.**—If you were concerned for a gentleman on his marriage with a lady, under age, in whose property it is proposed to give your client an interest, what course would you adopt to secure him the benefit of the interest agreed upon?

**A.**—If the lady were seventeen, it would be advisable to present a petition to the Court of Chancery under the Infant Settlements Act (18 & 19 Vict. c. 43), to sanction the settlement.

**Q.**—A marriage settlement is made prior to the year 1883, in the ordinary way, without application to the court, of funds of the husband and of reversionary property of the wife, who is a minor; under what circumstances and on what terms can she repudiate the settlement of her property?

**A.**—After attaining twenty-one, and during the coverture, the wife may elect whether she will confirm the settlement or give up her benefits under it: (*Smith v. Lucas*, 18 Ch. Div. 531.)

**Q.**—On an intended marriage it is agreed that the husband shall settle 5000*l.* cash, and the wife, a minor, a like sum, payable on the decease of the survivor of her parents under their settlement. State the deeds necessary before and after the marriage, to carry the settlement into effect, and what should be the principal clauses in each deed.

**A.**—If the infant is seventeen years of age the sanction of the Court of Chancery should be first obtained. The articles of settlement made before marriage should contain covenants by the husband to

settle the 5000*l.* upon trust for himself for life, then for wife for life, with a power in the settlement to appoint to the children of the marriage, and in default of appointment a special provision for the children; sons to take vested interests at twenty-one, daughters at that age or marriage, in equal shares, the ultimate trusts to be for the husband's next of kin. There must also be a covenant by the parents of the lady to settle the share to be appointed upon her for life to her separate use, then to the husband for life, and subject thereto to children as before; ultimate trust to be for wife's next of kin. The settlement made after the marriage, and when the female infant comes of age, if the court's sanction is not obtained, should carry these executory trusts into execution, and contain the usual powers to vary investments, to advance children, &c., &c.

*Q.*—*A.*, a minor, is tenant in tail in possession of a landed estate, consisting partly of freeholds—partly of copyholds—and partly of leaseholds, for terms of years, held by trustees, upon trust to correspond with the uses of the freeholds. On *A.* attaining twenty-one, what must be done in order to make him absolute owner of the different classes of property?

*A.*—In order to do this *A.* must execute a disentailing assurance of the freeholds, which must be duly enrolled; surrender the copyholds, which must be entered on the court-rolls of the manor, and take an assignment from the trustees of the leaseholds.

*Q.*—By a marriage settlement of personal estate, the fund was settled upon the wife for life, without power of anticipation; remainder to the husband for life; and after the death of the survivor, it was to be divided amongst the children, in equal shares, sons taking vested interests at twenty-one, and daughters at that age or day of marriage. The husband is dead, and all the children have attained twenty-one. The widow and the children are desirous to have the fund transferred to them by the trustees; can this be done with safety to the trustees during the life of the widow? State the reason for your answer.

*A.*—Yes; the trustees may with safety do this during the life of the widow; for the husband being dead, the restraint against anticipation is gone (*Will. P. P.* 432, 10th edit.), and for the like reason she cannot have further children, and those already born are all *sui juris*: (see *Groves v. Groves*; *Ex parte Whitehead*, 9 L. T. Rep. N. S. 533.)

*Q.*—*A.* covenants by marriage settlement that he will, within three years from the marriage, settle real estate of the value of 10,000*l.* upon certain trusts for the benefit of his intended wife and the children of the marriage; no particular estates are specified in the covenant; at the time of the settlement *A.* had two real estates only, each worth 5000*l.*, which he afterwards conveyed to purchasers; to one within, and to the other after, the expiration of three years; the wife and child of the marriage were living at the time of both the conveyances, and both the purchasers knew that fact, and were also aware of the covenant, and that *A.* had no other real estates. Has the wife or child any, and what claim on the two estates, or on either and which of them?

*A.*—Under these circumstances the wife and children will, it seems, be

creditors by specialty only; for it is a general rule, although it may not hold universally true, that a covenant to convey and settle lands (no particular lands being specified) will not be a specific lien on the lands of the covenantor, but the covenantee will be a creditor by specialty only: (Sug. Conc. V. 563; Sm. Man. sect. 317.)

**Q.**—Does a provision in a marriage settlement in the form of a general agreement by all parties for settling after-acquired property of the wife bind—(1) money given to the wife's separate use; (2) money over which the wife has only a general power of appointment? And does such a provision apply to property acquired after the determination of the coverture in cases where the provision is not expressly limited to property acquired "during the coverture?"

**A.**—If the wife concur in the agreement it will bind money given to her separate use (*Willoughby v. Middleton*, 1 J. & H. 344), but not property over which she has a general power of appointment unless the provision is specially made to extend to such property. The provision is limited to the duration of the coverture, unless there are some words distinctly showing that it is to last longer: (*Re Edwards*, L. Rep. 10 Ch. 97.)

**Q.**—A lady about to be married is entitled in reversion expectant upon the death of her mother to an estate in fee simple. A settlement is executed on her marriage, comprising personalty only, and containing a covenant in the following words: "If at any time after the solemnisation of the marriage and during the joint lives of the husband and wife she, by gift, devise, descent, or succession shall become entitled to any real or personal property," &c., then the same shall be settled. The marriage takes place, and the mother dies two years afterwards. Is the estate hit by the covenant? Give grounds for your answer.

**A.**—The estate will be subject to the covenant, as the change which takes place by the reversion becoming vested in possession during the coverture is such a change as to bring the property within the words of the covenant: (*Archer v. Kelley*, 1 Dr. & Sm. 300; *Re Clinton's Trusts*; *Ex parte Holloway*, 41 L. T. Rep. N. S. Chanc. 191.)

**Q.**—State the statutory powers of the Divorce Court over settlements after a decree *nisi* or a decree absolute for a dissolution of the marriage.

**A.**—By 20 & 21 Vict. c. 85, s. 45, where the court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the court that the wife is entitled to any property, either in possession or reversion, it shall be lawful for the court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property, or any part thereof, for the benefit of the innocent party and of the children of the marriage, or either or any of them. And by 22 & 23 Vict. c. 61, s. 5, it is provided, that "The court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents, as to the court shall seem fit." There need

not now be issue of the marriage living at the time of the order, by 41 Vict. c. 19, s. 3.

**Q.**—If a settlement by deed or will does not contain the usual powers of sale and of appointing new trustees, how are these defects to be respectively remedied?

**A.**—The 40 & 41 Vict. c. 18, empowers the court (Chancery Division) to authorise the sale of settled estates when the settlement contains no power to that effect. The application may be made by the tenant for life, &c., by petition in a summary way, with the consent of the proper parties; and by the Settled Land Act, 1882, the tenant for life can sell under the regulations of that Act without applying to the court. By the 23 & 24 Vict. c. 145, the surviving or continuing trustee or his acting executors or administrators, or the last retiring trustee, may appoint a new trustee, who has the same powers as if originally appointed (sect. 27); but this is repealed since 31st December, 1881, and a further power substituted by 44 & 45 Vict. c. 41, s. 31. So new trustees may be appointed by the court (Chancery Division) on petition: (see 13 & 14 Vict. c. 60.)

**Q.**—Upon the appointment of new trustees, where the trust property consists of both realty and personalty, how is the legal ownership in each description of property to be conveyed so as to vest it in the new and continuing trustee jointly?

**A.**—As to the realty, this would properly be effected by the continuing trustee conveying to a third person to the use of himself (the continuing trustee) and the new trustee, when the Statute of Uses will give them the legal estate. As to personalty, if it consist of stock, &c., it is sufficient to transfer the stock, &c., into the names of the trustees. If the property be leasehold, it was formerly assigned over to a third person, who reassigned it to the new and continuing trustee. But by the 22 & 23 Vict. c. 35, s. 21, any person may now assign personal property, including chattels real, directly to himself and another person by the like means as he might assign the same to another, and this is now the same with freehold land since 31st December, 1881, by 44 & 45 Vict. c. 41, s. 50.

**Q.**—When under a settlement or will a father has a power to appoint among all his children as he may think fit, will an appointment which leaves out one or more of such children be effectual, or is it necessary he should appoint a share to each; and, if so, must such share be a substantial, or may it be a merely nominal one?

**A.**—A father, who had the power of appointing among all his children, could not formerly leave out one or more of such children, as that would not be a valid exercise of the power; but the same object was attained by appointing a substantial share to one and a nominal share to another (1 Will. 4, c. 46; 1 Hughes's Pract. Sales, 390, 392, 2nd edit.); but now by 37 & 38 Vict. c. 37, such appointments, if made after the Act, 30th July, 1874, are good unless a declaration to the contrary is contained in the instrument creating the power.

**Q.**—What is meant by a fraud on a power of appointment? Give an example.

**A.**—Where a donee of a special power appoints a fund to one of the objects under it, under an understanding that the latter is to lend the

fund to the former, though on good security, or make over a part thereof to one not an object of the power. This would be a fraud on the power, not being for the sole benefit of the appointee, and will be set aside in equity: (Sm. Man. sect. 201.)

**Q.**—In case a father has a power of appointing a sum of money among his children, and in consideration of a sum paid to him by one of such children he makes an appointment in favour of such child, is the appointment good? And give a reason for your answer.

**A.**—In this case the appointment is bad, it being a fraud on the power; the father being in the position of a trustee, who cannot be allowed to stipulate for an advantage to himself by the execution of his trust: (St. Eq. § 255; *Aleyn v. Belchier*, 1 L. C. Eq. 346, *in notis*, 3rd edit.)

**Q.**—A., by his will, gives B. a power to appoint a sum of money to all, or some, or one of his (B.'s) children, as B. may think fit. B. has several children; one of such children dies in B.'s lifetime, leaving children, being B.'s grandchildren. Is B. authorised under such power to appoint any part of the money to such his grandchildren, or any of them?

**A.**—B. is not, under this power, authorised to appoint any part of the money to his grandchildren or any of them: (see *Alexander v. Alexander*, L. C. Conv. 299; Sug. Pow. 252, 7th edit.; Burt. Com. pl. 571 and note.)

**Q.**—Funds are settled upon trust for husband and wife and the survivor for life, and subject thereto for the issue of the marriage (born during their lives or the life of the survivor) as they or the survivor shall appoint, and in default for the child, if only one, to vest at twenty-one, &c. The father dies—the joint power not having been exercised—leaving an only child, who attains twenty-one. What estate has such child during the mother's lifetime? Can it be defeated? and if so, how?

**A.**—The child has a vested interest, subject to its being divested by an appointment by the mother to any grandchildren (as the power to appoint among issue would include grandchildren): (Prideaux, 11th ed. vol. 2, p. 197.)

**Q.**—Suppose an estate being settled upon A. for life, with remainder to such son of his as he should appoint, and A. should appoint to his son B., who has just attained twenty-one, and A. and B. should thereupon mortgage the estate to a third person for money advanced to A., would such a transaction be valid? State the reasons for your answer.

**A.**—It is doubtful whether the transaction would be binding. The son does not receive any part of the money, and that would seem to imply a fraud on the power. However, it must be clearly shown that the mortgagee had notice of the fraud, in order to set aside the transaction: (see *McQueen v. Farquhar*, 11 Ves. 467; *Aleyn v. Belchier*, 1 L. C. Eq. 346, 351, *in notis*, 3rd edit.)

**Q.**—May a deed or will executed by virtue of a power requiring attestation by three witnesses be executed only in the presence of two? If so, name the statutes respectively authorising such alteration.

A.—The 1 Vict. c. 26, s. 10, provides that a will executed in the presence of two witnesses, as required by the 9th section, is a valid execution of a power of appointment by will: (sect. 10.)

And the 22 & 23 Vict. c. 35, enacts that a deed, hereafter executed and attested in the presence of two witnesses, shall, as far as regards the execution and attestation thereof, be a valid execution of a power of appointment by deed: (sect. 12.)

Q.—Before the Wills Act was there any exception to the rule that required a strict adherence to the prescribed formalities?

A.—Before the Wills Act, the prescribed forms required on the execution of a power must have been complied with in all cases. Yet if the power was to be executed by a will, and the property was real estate, and no formalities were named, the formalities required by the Statute of Frauds should have been complied with: (1 Sug. Pow. 155, 280, 7th edit.)

Q.—Where a will contains a power to raise money out of an estate not confined to raising it out of the rents, or a power to charge an estate generally, would such power authorise a sale or mortgage of the estate, or both?

A.—A power generally to raise a sum of money out of an estate or to charge an estate generally, would authorise either a sale or mortgage of it: (1 Sug. Pow. 538, 539, 6th edit.; Burt. Comp. 1501, &c.; Sm. Man. sect. 256.)

## TESTAMENTARY ALIENATION.

Question.—What is a will?

Answer.—A written instrument by which a person expresses what he *wills*, or wishes to be performed after his death. Wills are technically divided into *wills* or *devises*, and *wills* or *testaments*. A will or devise is applied to the disposal of real estate. A will or testament is applied to the disposal of *personal* estate: (see Holth. L. D. 2nd edit.) But see 1 Vict. c. 26, s. 1.

Q.—Trace very shortly the growth of the power of disposing of real estate by will from the time of Edward the First to the present day.

A.—The alienation of lands by will was not allowed in this country until many years after the passing of the statute of *Quia emptores*, except in the City of London, and a few other places by virtue of special custom. In process of time, however, a method of devising lands was covertly adopted by means of conveyances to other parties to such uses as the person conveying should appoint by his will. This was intentionally restrained by the Statute of Uses (27 Hen. 8, c. 10), but five years after, by further statutes (32 Hen. 8, c. 1, and 34 & 35 Hen. 8, c. 5), lands in free socage were allowed to be devised by will; but it was not until the restoration of Charles II., when feudal tenures were abolished, that the right of devising freehold lands became complete and universal. And the present Wills Act (1 Vict. c. 26) gives the fullest powers of disposing of real estate by will: (see Will. R. P. 64, 13th edit.)



**Q.**—Compare the operation of a will of personalty with that of a will of lands, as regards the vesting of the property bequeathed or devised to a legatee or devisee.

**A.**—Real property vests in the devisee from the death of the testator, whereas personalty vests in the executor for payment of debts in the first instance, and requires the assent of the executor before passing to the legatee.

**Q.**—Explain the nature of the transaction connected with conveyancing mentioned in the following extract from a letter written in the year 1462, and show how such a transaction would now be carried out :—“ Sir John Fastolf, whom God assoyle, was sometime by Sir Harry Inglose enfeofed of trust of his manor of Pickworth, in Rutland, the which Sir Harry Inglose made his will, proved, that the said manor should be sold by his executors, to whom the said Sir John has released, as it was his duty to do :” (Paston Letters, p. 89, vol. ii. ed. 1874.)

**A.**—Before the Statute of Uses, 27 Hen. 8, c. 10, if owners of land made a feoffment of it to another without consideration, it was held by the Court of Chancery that it was meant by the feoffor to be for his own use ; and the Court of Chancery at that time allowed the use of land to be devised by will, whereas the land itself could not be : (see Wms. R. P. the

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**Q.**—A. and B. are seised in fee of three estates, numbered 1, 2, 3. They hold the estate No. 1 as tenants in common; the estate No. 2 as joint tenants; No. 3 as coparceners. Can A. and B., or either of them, by will devise their undivided shares in these three estates, or any, and if any, which of them?

**A.**—A. or B. may devise his undivided share of either the estates held in tenancy in common or coparcenary (Nos. 1 and 3); for they have a several, though undivided interest. Joint tenants (No. 2), while they continue such, cannot devise their interest in the estate, for there is the right of survivorship existing between them. But should one joint tenant at any time before his death become possessed of the whole estate or of a separate and divided share by survivorship, partition, or otherwise, the devise would pass the interest, no matter when the will was made: (Hayes & Jarm. Conc. Wills, 91, &c., 6th edit.)

**Q.**—When, and of what property, may a married woman make a will?

**A.**—She may, if of full age, make a will of property settled to her separate use or over which she has a general power of appointment; or of goods vested in her as executrix; or of her *personal* estate with the assent of her husband; or of the property declared by the 33 & 34 Vict. c. 93, or 45 & 46 Vict. c. 75, to be her separate property. She may also make a will if her husband is banished for life; or, it seems, during the time he is transported for a term of years; or if she has obtained a protection order, or has a judicial separation decreed under the Divorce Act: (see Hayes & Jarm. Conc. Wills, 82, 168, 6th edit.; *Taylor v. Meads*, 12 L. T. Rep. N. S. 6.)

**Q.**—What power (if any) of disposition by will has a wife dying in her husband's lifetime over real estate belonging to her absolutely, and not the subject of any settlement?

**A.**—If she has no power of appointment over it, and it is not separate property under a settlement or the Married Women's Property Acts, she cannot dispose of it by will.

**Q.**—A lady under her marriage settlement has a power of appointing her property by will in the event of her husband surviving her, and has made such a will in favour of her own relations. If she were to call on you after her husband's death for advice generally in her affairs, what should you say to her as to her will?

**A.**—In such a case I should advise her that her will was inoperative as to the appointment, as powers are most strictly construed, and that she must make a fresh will.

**Q.**—A married woman, having separate estate, and having under her marriage settlement a general power of appointment, in the event of her dying in her husband's lifetime, over property which, if she survives him, vests absolutely in her, makes a will with the assent of her husband, purporting to exercise the power and to dispose of the separate estate and of her residuary estate; she survives her husband, and dies. What is the effect of the will with regard to (1) the separate estate; (2) the property subject to the power; (3) property acquired by her after her husband's death?

A.—(1) This will pass under the will, the woman being deemed to be a *feme sole* as to it (*Taylor v. Meads*, 34 L. J. 203, Ch.); but as to (2) and (3) the will will be inoperative: (see *Noble v. Wilcock*, L. Rep. 8 C. A. 779.)

Since 1882, however, a married woman may dispose by will of any property acquired by her or which belonged to her at the time of marriage if after that date: (45 & 46 Vict. c. 75.)

Q.—When was the Act for the amendment of the law with respect to wills passed, and from what day does it take effect?

A.—The Act for the amendment of the law with respect to wills was passed in July, 1837, and takes effect from the first day of January, 1838: (1 Vict. c. 26, s. 34.)

Q.—What well-known rules of law have been made to give way to the testator's intention by the Wills Act, 1837?

A.—That a general devise of lands did not include leaseholds, and a general devise or bequest of real or personal estate, real or personal estate subject to a general power of appointment, or trust estates. That a fee simple cannot pass without words of limitation. That "dying without issue" meant an indefinite failure of issue. That all devises and bequests lapsed by death of devisee or legatee in lifetime of testator.

Q.—State the mode in which a will is required to be executed by the Act, 7 Will. 4 & 1 Vict. c. 26, for the amendment of the law relating to wills; and has any further alteration been made?

A.—The 1 Vict. c. 26 enacts that the will must be signed at the foot or end thereof by the testator, or by some person in his presence and by his direction. And the signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses must attest and subscribe the will in the presence of the testator: (sect. 9.)

The strictness with which the court construed the words "at the foot or end thereof" caused many wills to be rendered invalid. An Act was therefore passed to remedy this, and it provides that the will shall be valid if not strictly signed at the foot or end, provided it is apparent on the face of the will that the testator intended to give effect by his signature to the writing signed as his will. But the signature will not give effect to any disposition which is underneath or follows it, &c.: (see 15 & 16 Vict. c. 24.)

Q.—What are the proper solemnities to be observed on the execution of a will by a testator who is blind?

A.—In addition to the usual formalities it is desirable, though not at law necessary, that the will should be read over to the testator, and when the witnesses attest the will they must be in such a position that the testator, if not blind, could see them: (Hayes & Jarm. Conc. Wills, 14, 16, *in notis*, 6th edit.)

Q.—Who ought not to be an attesting witness to the execution of a will? (a)

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(a) Also asked thus: In giving written instructions to a testator for the execution of his will, would you feel it necessary to caution him against applying to any and what class of persons as attesting witnesses, and why?

A.—No person should attest the execution of a will to whom, or to whose wife or husband, any beneficial interest is given (except a charge for payment of debts), otherwise the gift will be void, but the person attesting will be a good witness: (1 Vict. c. 26, s. 15.) Nor does the incompetency of the witness at the time of execution, or subsequently, invalidate the will: (sect. 14.)

Q.—Can a person be admitted as a witness to prove the execution of a will, or the validity of it, who, or whose wife or husband, takes a beneficial legacy under the will; and will she or he be entitled to the legacy or not?

A.—The gift will be void, but this does not prevent the person to whom, or to whose wife or husband, the legacy is given, being admitted to prove the execution or validity of the will: (1 Vict. c. 26, s. 15.)

Q.—What is the effect of a legacy to a child of an attesting witness?

A.—The legacy is good, as the 1 Vict. c. 26, s. 15, does not apply in this case: (see *Hayes & Jarm. Conc. Wills*, 43, &c., 6th edit.)

Q.—A testator by his will devises property to his wife, and by a codicil thereto, to which she is a witness, confirms his will; will the devise to the wife be void?

A.—The devise will be good, provided the wife did not also attest the will (*Denne v. Wood*, 4 L. J. O. S. 57); so, *vice versa*, when a will attested by a legatee is afterwards republished by a codicil attested by other witnesses, the gift of the legatee is made good: (see *Gurney v. Gurney*, 3 Drew. 208; *Anderson v. Anderson*, L. Rep. 13 Eq. 381.)

Q.—Is there any, and what, valid objection to an executor or creditor being an attesting witness to the execution of a will?

A.—No person on account of his being appointed executor of a will is thereby rendered incompetent to be admitted as a witness to prove its execution. A creditor may also attest the execution of a will, although there may be a charge for payment of debts: (1 Vict. c. 26, ss. 16, 17.)

Q.—Previously to January, 1838, how many witnesses were required to a will of real estate, and how many to a will of personal estate; and what is the present law in regard to each?

A.—The Statute of Frauds required three witnesses at least to a will of real estate; but none were necessary in the case of a bequest of personal estate; by the 1 Vict. c. 26, s. 9, however, two or more witnesses are required in the testamentary dispositions of both descriptions of property: (*Will. R. P.* 206, 13th edit.; *Brow. R. P. Stats.* 200, &c.)

Q.—Does the Wills Act contain any, and what, provisions as to the exercise by will of powers of appointment?

A.—The Act (sect. 27) provides that if a will is executed as required by the Act it will pass all property over which the testator has a general power of appointment by will, unless a contrary intention appear.

Q.—What attestation is requisite to the valid execution of a will? and if a form of attestation be subscribed, what should that form be?

A.—The 1 Vict. c. 26, requires the will to be attested by two or more

witnesses present at the same time, who are to attest and subscribe the will in the presence of the testator, but no form of attestation is necessary : (sect. 9.)

A form of attestation is, however, invariably used, which runs thus : "Signed by the said A. B., the testator, as and for his last will and testament, in the presence of us, present at the same time, who in his presence (in the presence of each other), (a) and at his request, have hereunto subscribed our names as witnesses. Also, if a form is not used, the Probate Court will require an affidavit that the will was executed properly before they grant it probate : (Hayes & Jarm. Conc. Wills, 121, &c., 6th edit.)

**Q.**—Transcribe the form of attestation to a codicil.

**A.**—"Signed by the said testator as and for a codicil to his will, in the presence of us, present at the same time, who, in his presence, at his request, have hereunto subscribed our names as witnesses."

**Q.**—Is it requisite that the testator see the witnesses attest the will ?

**A.**—It must be attested in his presence, but it will satisfy the Act if the testator be in such a position that he might have seen the witnesses attest the will if he chose to look : (see Hayes & Jarm. Conc. Wills, 16, 17, 6th edit. ; *Ld. St. Leonards' Handy Book*, 149; 6th edit.)

**Q.**—Must all the witnesses sign their names in the presence of each other ?

**A.**—The 9th section of the Wills Amendment Act does not, it will be seen, require this, but it will not be prudent, in any case, that either of the witnesses should leave the room until every requisition of the Act is complied with : (*Alln. Wills & Adms.* 75, 2nd edit. ; *Hayes & Jarm., ubi sup.* ; *Sug. R. P. Stats.* 336.)

**Q.**—If alterations are made in a will previous to the signing, what precautions would you use with respect to them ?

**A.**—Alterations in a will previous to executing it should, as a proper precaution, be marked in the margin by the testator and witnesses, and referred to in the attestation clause : (1 Vict. c. 26, s. 21 ; *Sug. R. P. Stats.* 341, 347.) Indeed, important alterations, if not noticed in the attestation clause, must be proved to have existed in the will before execution : (*Prob. Rules*, 1858, r. 9.)

**Q.**—What is necessary if the testator makes alterations after signing ?

**A.**—The will must be re-executed ; but the will with such alterations will be deemed duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near the alterations, or at the foot or end of or opposite a memorandum referring to such alterations and written at the end or some other part of the will : (1 Vict. c. 26, s. 21 ; *Sug. R. P. Stats.* 347.)

**Q.**—Is a will unattested under any circumstances valid ?

**A.**—The wills of soldiers on active service, and seamen at sea, with the exception of petty and non-commissioned officers of the navy or marines,

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(a) These words are not necessary, and had better be omitted.

and seamen and marines in the navy, &c., as to their pay, &c. (see 1 Will. 4, c. 20; 28 & 29 Vict. c. 71), are valid although unattested, and they may even make nuncupative wills: (see 1 Vict. c. 26, ss. 11, 12; Brow. R. P. Stats. 204, 205, and notes.) (a)

**Q.**—How can the revocation of a will be now effected?

**A.**—By marriage; or by another will or codicil duly executed, or by some writing, declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same: (1 Vict. c. 26, ss. 18, 20.)

**Q.**—How may a revoked will or codicil be subsequently revived?

**A.**—Only by re-execution, or by a codicil duly executed, showing an intention to revive the will. And if the will is partly revoked and afterwards wholly revoked, and then revived, such revival does not extend to that portion which was in the first instance only partly revoked, unless a contrary intention appears: (see 1 Vict. c. 26, s. 22.)

**Q.**—State the effect of marriage upon the will of a man before and since the 1 Vict. c. 26.

**A.**—Before this Act, marriage alone of a man did not revoke his will; the law required marriage and the birth of a child to do this. Now, marriage revokes the will of a man as well as of a woman; except it be a will made in pursuance of a power of appointment, when the estate thereby appointed would not, in default of appointment, go to his real or personal representatives: (see sect. 18; Brow. R. P. Stats. 207.)

**Q.**—A widower makes a will, leaving all his real and personal estate to an only child (a daughter), and afterwards marries again. On his dying without making any further will, and leaving the above daughter and his wife, and a son and daughter by her, him surviving, how do his real and personal estate go?

**A.**—The will is revoked by the subsequent marriage, and his real estate, subject to his widow's dower (if any), descends to the son, whilst the widow takes one-third of the personalty, and the remainder is divided equally amongst his three children.

**Q.**—What effect has a codicil properly executed under the 7 Will. 4 & 1 Vict. c. 26, on a will made previously, which would have been good as the law then stood, but not so under this Act?

**A.**—Although a testamentary instrument is not properly executed or attested, yet if it is clearly referred to by one of later date, properly executed and attested, it will be operative, and no particular form of expression is necessary: (Sug. R. P. Stats. 839.) Therefore in the question put, the will will be operative if referred to in the codicil.

**Q.**—Is a will made before marriage, and consequently thereby revoked, revived by a codicil made after marriage giving legacies, but not referring

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(a) But the Board of Trade may refuse to deliver the wages or effects of any deceased merchant seaman to the person claiming them under a will made on board ship unless the will is in writing, signed or acknowledged by the testator in the presence of the master or first mate: (17 & 18 Vict. c. 104.)

to the will otherwise than by the introductory words, "This is a codicil to my will?"

A.—If the will and codicil are written on the same paper, or if it can be shown that the testator never made any other will (for which purpose parol evidence is admissible), the reference in the codicil to the will will be sufficient to set up and revive the will; but, in the absence of such proof, the reference would be too vague for this purpose: (see *Allen v. Maddock*, 31 L. T. Rep. N. S. 359; Sug. R. P. Stats. 339; Ld. St. Leonards' Handy Book, 151.)(a)

Q.—State the effect as to revocation by any conveyance or act done relating to the estate disposed of, not being in itself an act of revocation, subsequently to the execution of the will.

A.—If the testator, after disposing of his property, real or personal, by his will subsequently conveys or parts with such property, the will is necessarily revoked: (see *Moore v. Raisebeck*, 12 Sm. 123, 139, and see 1 Vict. c. 26, s. 23; Brow. R. P. Stats. 210.) And formerly, if the testator had repurchased such property, it would not have passed under the will without a republication; now, however, a will speaks from the death, and passes all his property: (see sects. 3, 23; Brow. R. P. Stats. 195, 210.)

Q.—Will a mortgage in fee operate in law and equity as a revocation of a will made previously?

A.—It will operate as a revocation to the amount of the charge only: (see 17 & 18 Vict. c. 113.)

Q.—On what words or expressions in a will of real property, and on what other circumstances will depend the question whether or no real estate purchased after the date of the will passes under the devise in it?

A.—The after-acquired property will pass under the will, for the will speaks from the death, unless a contrary intention appears (1 Vict. c. 26, ss. 3, 24); as where the devise was of all the estate of which "I am now seised," clearly showing a reference to the date of the will. So if the devise be specific, as of "all my Q. H. estates in E." and there be no residuary devise, other property or additions cannot pass by the will: (*Webb v. Byng*, 1 K. & J. 580.)

Q.—B., owning 500 acres of freehold land in fee simple, quarrelled with his eldest son and heir, and on the 13th June, 1830, made a will devising generally "all his real estate, whatsoever and wheresoever," to his youngest son. He lived but ten years more, during which he bought the Fransham estate of 1200 acres, and died in 1840 without having been reconciled to his eldest son, or having touched or added to his will in any way. How did his real estate devolve?

A.—The Fransham estate, purchased by the testator after the date of his will, devolves on his eldest son as heir-at-law, as the Wills Act (1 Vict.

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(a) And it seems that if the will is revoked by actual destruction, as if it be burnt, a codicil clearly referring to it cannot revive it as a will in writing, within the 9th section of the 1 Vict. c. 26: (*Rogers et al. v. Goodenough et al.*, 5 L. T. Rep. N. S. 719; see also *Newton v. Newton*, *ib.*, 218.)



c. 26), which provides that after-acquired property shall pass under a general devise, does not apply to wills executed before the 1st day of January, 1838. His second son takes merely his real estate at the time of making his will.

Q.—Suppose a will to devise all the testator's real estate, and the testator, after executing his will, purchase or acquire a freehold estate, and do not subsequently re-execute his will or make any devise of such estate, to whom upon his death will such after-purchased or acquired estate descend?

A.—To the devisee, and not to the heir, as would have been the case before the 1 Vict. c. 26, ss. 3 and 24.

Q.—A testator by his will gives all his "land" to his son John. He dies possessed of freehold, copyhold, and leasehold properties. Which of these will pass to his son John, and why?

A.—They will all pass, as by sect. 26 of the Wills Act (1 Vict. c. 26) a devise of land includes the customary copyhold and leasehold estates of the testator as well as freehold estates, unless a contrary intention appear in the will.

Q.—If the testator do not name any executor of his will, who would be entitled to probate?

A.—The court, in the exercise of its discretion, considers the right to administration to follow the right to the property. In the case put, therefore, administration *cum testamento annexo* would be granted to the residuary legatee in preference to the next of kin: (Alln. Wills, 106, 107, 3rd edit.)

Q.—In what court or registry should a will of personalty be proved, where the testator leaves *bona notabilia*, in different districts?

A.—Formerly, if the testator left *bona notabilia*, or chattels, to the value of 5*l.* in two distinct dioceses within the same province, the will must have been proved in the Prerogative Court of that province. But now it may be proved in the district registry wherein the testator had at the time of his death a fixed place of abode; and such probate has effect over the personal estate of the deceased *in all parts* of England; or it may be proved in the principal registry: (see 20 & 21 Vict. c. 77, s. 46; Coote's Prob. Pr. 7 *et seq.*, 6th edit.)

Q.—If a testator dies leaving personal property in France, India, and Canada, and not transferable in England, are such assets liable to probate and legacy duty?

A.—Probate duty is not payable in respect of personal estate which, at the time of the testator's death, was in a foreign country, though he dies in England, and though the executors afterwards bring the property here (*Attorney-General v. Diamond*, 1 Cro. & J. 356); but the assets would be liable to legacy duty: (*Re Ewin*, *Ib.* 151.)

Q.—Define the difference between probate duty, legacy duty, and succession duty.

A.—Probate duty is an *ad valorem* duty payable to Government on assets which at testator's death are within the jurisdiction of the Probate Court. Legacy or succession duty is a percentage tax also payable to



Government upon the clear benefit the legatee or successor derives from the legacy or succession.

**Q.**—A fund is settled by A. (the husband) on his marriage with B. (the wife), upon the usual trusts, viz., income to A. for life, then to B. for life; then the corpus to children as A. shall appoint, and in default of appointment equally on attaining twenty-one—hotchpot clause. There are two children only, C. and D., who both attain twenty-one. Half the fund is appointed to C. D. dies intestate and unmarried; then A. dies, without further exercise of his power of appointment, leaving his residue to B., whom he appoints his executrix. B. leaves her residue to E. (a stranger), appoints him executor and dies. Show on whom and by what steps the trust fund devolves, and to what duties it becomes liable in such devolution; the rate of duty need not be stated.

**A.**—C. would take half the fund under the appointment, and pay succession duty on B.'s death; and as D. died intestate the half unappointed, which vests in him under the hotchpot clause, devolves on his father A., from whom it passes to B., and thence to E. Probate duty would be due on this share on the deaths of D., A., and B., and as it is a transmitted succession, only one duty would be payable at the highest rate (10 per cent.) on B.'s death: (16 & 17 Vict. c. 51, s. 14.)

**Q.**—What is the meaning of "a lapsed legacy" and in what instance does a legacy not lapse?

**A.**—"A lapsed legacy" is one that fails, as in case of the death of the legatee in the testator's lifetime. A legacy does not lapse where it is given to a child or other issue of the testator who dies leaving issue living at the testator's death, unless a contrary intention appears in the will: (1 Vict. c. 26, s. 33.)

**Q.**—Are there any cases in which the interest of a devisee or legatee does not lapse by their death in the lifetime of the testator? And give instances.

**A.**—Yes: 1. Where the devisee of an estate tail, or *quasi* entail, dies in the testator's lifetime, leaving issue inheritable under such entail, living at the testator's death. 2. Where a child or other issue of the testator is the devisee or legatee (not being for life merely), and dies in the testator's lifetime leaving issue living at the testator's death, unless in either case a contrary intention appears by the will: (1 Vict. c. 26, ss. 32, 33.) The interest goes in such case in such manner as if such deceased issue had survived the testator.

**Q.**—John Careful died in 1840 seised of three freehold estates, called respectively Longacre, Westlands, and Overton; he had devised Overton to his son William in fee, Longacre to a nephew in fee, and the residue of his property to his son John in fee; all the devisees died in his lifetime leaving issue at his decease. How did the estates devolve?

**A.**—The devise of Longacre to the nephew lapses, and it falls into the residue with Westlands, which, with Overton, unless a contrary intention appears in the will, will not lapse, but will descend in the same manner as if the sons William and John respectively had survived their father, the testator: (1 Vict. c. 26, s. 33.)

**Q.**—A testator, having three sons, devised lands to his youngest son in fee. The youngest son died before the testator, leaving two daughters and no son. To whom, on the death of the testator, would the land go? State the reason for your answer.

**A.**—The land will go to the two granddaughters as representing their parent, if the son had not disposed of it by his will, for, as above stated, there is no lapse in such a case: (see references, *sup.*)

**Q.**—A testator leaves a legacy to his son, and a legacy to a nephew. Both die before the testator, leaving children. Do the legacies lapse? and if not, to whom are they respectively payable?

**A.**—The legacy to the son will not lapse, but form part of his personal estate, and will be distributable amongst his widow and children, unless he leave a will disposing of the legacy thereby. (a) The legacy to the nephew will lapse and fall into the residue, if one; if none, it will go to the testator's next of kin: (1 Vict. c. 26, s. 33; Hayes & Jarm. Conc. Wills, 73, 105, 6th edit.)

**Q.**—An owner in fee simple devises two estates specifically, and leaves the residue of his real and personal property to B., C., and D. as tenants in common. B. dies during the testator's lifetime. What becomes of his share?

**A.**—B.'s share of the two estates specifically devised lapses (he not being a son or other issue of the testator leaving issue at testator's death), and falls into the residuary devise; his share in the residue also lapses, but goes to the heir and next of kin respectively of the testator: (see *Ackroyd v. Smithson*, L. O. Eq., vol. 1.)

**Q.**—What is the construction of the words "die without issue" in a devise or bequest of real or personal estate?

**A.**—These words are construed to mean a want or failure of issue in the lifetime or at the death of such person, and not an indefinite failure of issue, unless a contrary intention appears by reason of his having a prior entail, or a preceding gift (not implied from such words) of an entail to him, or his issue: (1 Vict. c. 26, s. 29; Will. R. P. 216, 13th edit.; and see 45 & 46 Vict. c. 39, s. 10.)

**Q.**—Portions given to arise out of lands to be paid at twenty-one or marriage. The object dies under twenty-one without having been married. What becomes of the portion? The same question as to a legacy of personalty.

**A.**—The portion to arise out of the land will not be raised, but sinks into the real estate, as the time of payment has reference to the *legatee personally*. The legacy to be paid out of the personalty, however, will not lapse, but be payable to the representatives of the deceased legatee: (*Parker v. Hodgson*, 4 L. T. Rep. N. S. 267; Gold. Eq. 190, 191, 4th edit.; 2 Sm. Comp. 1162, 4th edit.)

**Q.**—Will a lapsed devise of real estate go to the residuary devisee of real estates, if any, or to the testator's heir?

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(a) If the son leaves a will, probate duty must be paid on the amount twice: once under the father's will, and once on the son's will: (*Exors. of Perry, deceased, v. The Queen*, L. Rep. 4 Exch. 27.)

**A.**—It will fall into and form part of the general residuary estate, and pass accordingly, unless a contrary intention appears; but if there be no devise of the residue, it will go to the heir-at-law as formerly: (1 Vict. c. 26, s. 24; Sug. R. P. Stats. 367; Brow. Stats. 211.)

**Q.**—A. by will devises his estate called Blackacre to B., and gives the residue of his real estate to C. B. dies in the testator's lifetime. To whom will Blackacre go?

**A.**—To C.; since the 1 Vict. c. 26, s. 24.

**Q.**—When do trust and mortgaged estates pass under a general devise, and when not?

**A.**—With respect to persons dying previous to 1882 trust and mortgaged estates pass under a general devise of all the testator's estate, unless a different intention can be collected from the context of the will. Complicated limitations of the property would show a contrary intention. So if the testator charged his estates with the payments of debts or legacies, trust and mortgaged estates did not pass: (see *Lord Braybrooke v. Inskip*, 8 Ves. 496; Burt. Comp. pl. 611; Hayes & Jarm. Conc. Wills. 292, n., 6th edit.) With respect to persons dying after 31st December, 1881, trust and mortgaged estates will, by 44 & 45 Vict. c. 41, s. 30, devolve on the personal representative notwithstanding any devise of the same.

**Q.**—Before the Wills Act, 1837, what doubts frequently arose on devises to trustees, and how have such questions been settled by this statute?

**A.**—From a want of acquaintance on the part of testators with the Statute of Uses, great difficulties frequently arose in determining the nature and extent of the estates of trustees under wills. In doubtful cases the leaning of the courts was to give to the trustees no greater estate than was absolutely necessary for the purposes of their trust. But this doctrine having been found inconvenient, provision was made by the Wills Act (7 Will. 4 & 1 Vict. c. 26, ss. 30 and 31), that no devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest, and that trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, take the fee: (see Will. R. P. 219, 13th edit.)

**Q.**—A testator devised land held in fee simple to A. in fee, and devised trust estate vested in him to B. The testator afterwards contracted to sell the land, but died before executing the conveyance. By whom can a valid and effectual conveyance be made to the purchaser?

**A.**—It was formerly held that a devise of trust estate did not include constructive trusts, but the M. R., in the case of *Lysaght v. Edwards* (2 Ch. Div. 499), decided that constructive trusts passed under a devise of trust estates. B. must therefore convey the legal estate, and the executor must join to give a valid discharge for the purchase money: (*Eaton v. Sanxter*, 6 Sm. 517.) In case of persons dying after 31st December, 1881, the executor alone could convey: (44 & 45 Vict. c. 41, s. 30.)

**Q.**—In wills made before the Act 1 Vict. c. 26, mention some of the

expressions, not being words of limitation, which were held to confer a fee simple.

A.—The following expressions were held to confer a fee even before the 1 Vict. c. 26: a devise to one in *fee simple*, or to him *for ever*, or to him *and his assigns for ever*; or by a devise of all the testator's *estate*, or *property*, or *inheritance*, and the like: (Will. R. P. 215, 13th edit.; Burt. Comp. pl. 286–290.)

Q.—Suppose, before the Act 1 Vict. c. 26, a house was devised to the use of A. and his heirs upon trust for B., and in a deed a limitation in the same words. What estates do A. and B. respectively take under the deed and will?

A.—Even before the Act 1 Vict. c. 26, it seems to have been laid down that a devise to a trustee (A.) and his heirs, in trust for another (B.) without words of limitation, gave the trustee the legal fee, and the *cestui que trust* the equitable fee: (see cases cited 2 Jarm. Wills. 177, 1st edit.) In a deed, however, A. would take the legal fee, and B. an equitable estate for life only: (*Holliday v. Overton*, 21 L. J., N. S., 769.)

Q.—Devise to B. after the death of A.; does A. take any and what estate?

A.—If B. is a *stranger*, no estate will arise to A. by implication. Had it been a devise to the *testator's heir* after the death of A., then A. would have had an estate for life by implication: (*Gardner v. Sheldon*, L. C. Conv. 541, 2nd edit.: Jarm. Wills. 497, 498, 3rd edit.)

Q.—Give in the most brief form of words a devise of a freehold estate, say Blackacre, in fee, by A. to B. Are words of inheritance absolutely necessary? How may they be dispensed with?

A.—The briefest form would be simply to say, “I devise my freehold estate, called Blackacre, to B.” The 1 Vict. c. 26, enacts that where any real estate shall be devised to any person, without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will: (sect. 28.) Words of limitation are, however, in practice, still used.

Q.—Will a fee simple pass by will to the devisee without words of limitation? and, if it will pass, cite the authority for your answer. Would it be the same if the testator made his will in 1801, and died in 1857?

A.—A fee simple will, as just shown, pass by will, without words of limitation: (1 Vict. c. 26, s. 28.) But this Act only applies to wills made after the 1st January, 1838; therefore, if the testator's will was *made* before 1838, although he died after that time, this Act will not apply: (see sect. 34; Brow. R. P. Stats. 216.)

Q.—Testator was entitled to freehold estates, part of which he purchased; over other part he had a general power of appointment, and over the remainder he had only a power of appointment in favour of particular persons. He made a general devise (since the Wills Act) of “all my real

estate" to individuals, which included the particular persons. Did the devise operate upon all or which of the estates?

A.—The devise would operate upon the estates purchased, and upon that over which testator had a general power of appointment: (1 Vict. c. 26, s. 27.)

Q.—What does a general devise of real estate comprise under the present law? How far is the point affected by the devise being either upon trust for sale, or subject to the payment of debts and legacies, or any other charge?

A.—It not only comprises all lands of the testator and those over which he has a general power of appointment, but leaseholds and trust estates, (a) unless a contrary intention appear; but a devise upon trust for sale, or charged with debts and legacies, would prevent trust estates passing under it: (*Lord Braybrooke v. Inskip*, 8 Ves. 435; *Hawkins on Const. of Wills*, 35, 36.)

Q.—A. devises lands to B., who is his heir-at-law. Does B. take by descent or purchase, and has the law on that subject undergone any and what recent alteration?

A.—Under the old law, a devise by a testator to his heir-at-law would have been void, the heir in such case taking by descent. But by the 3rd section of the 3 & 4 Will. 4, c. 106, the heir in such a case is to take by purchase and not by descent: (see *Will. R. P.* 220, 13th edit.)

Q.—Suppose a testator to have devised his lands away from his eldest son and to have directed by his will that his eldest son should not be his heir, would this declaration have any, and if any what, effect? Give a reason for your answer.

A.—It would not have any effect; it would not prevent the heir taking the property in case of lapse. The reason is that the heir can only be disinherited by words substituting some other person for him: (*Gardner v. Sheldon*, L. O. Conv. 541, 2nd edit.; *Hall v. Warren*, 5 L. T. Rep. N. S. 190.)

Q.—A testator seised in fee of lands, and also of the tithes of them, devises the lands without expressly including or showing his intention to include the tithes. Will the latter pass to the devisee of the land?

A.—The ownership of both tithes and the lands out of which they issue by the same person will not have the effect of merging the one in the other; consequently, they will not pass under the devise of the lands, unless indeed they may have been merged under the Tithe Commutation Act: (*Will. R. P.* 348, 13th edit.)

Q.—A gentleman, a widower, having real and personal estate, makes his own will in these terms: "I give my real estate to my eldest son A. and his sons in succession for ever; I give my personal estate to my right heirs in equal shares as tenants in common." He dies leaving three sons and two daughters. Give the construction of this will.

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(a) Trust estates vest in the personal representative in case of persons dying after 31st Dec. 1881: (44 & 45 Vict. c. 41, s. 30.)

A.—The gift of the real estate creates an estate tail male in A. The bequest of the personal estate in the terms mentioned will, it seems, give the property to the testator's children equally, as the context explains who are intended by the use of the word "heirs," and takes it out of its ordinary significance: (see 2 Jarm. Wills, 73-75, 377, 3rd edit.)

Q.—A testator devises real estate to A. for life, with remainder over to A.'s first and other sons successively in tail male, with remainder over to testator's own right heirs. Under such a devise, when does the ultimate remainder become vested in the heirs of the testator, viz., at his (the testator's) decease, or at the time of the failure of the prior limitations?

A.—The ultimate remainder becomes vested at the testator's decease: (1 St. C. 323, 8th edit.)

Q.—A. by his will dated in 1850 devises Blackacre to his daughters C. and D. as tenants in common, and Whiteacre to his nephews E. and F. as tenants in common, and devises all the rest of his real estate to his second son X. D. dies in the lifetime of the testator, leaving a son G.; and F. also dies in the lifetime of the testator, leaving a son H. The testator dies leaving surviving him C., E., G., H., X., and his eldest son Y., his heir-at-law. To whom do Blackacre and Whiteacre respectively pass, and why?

A.—Unless a contrary intention appears in A.'s will, D.'s share of Blackacre will not lapse, but will go to her son G. (subject to her husband's, if any, curtesy, and to her not having disposed of it by her will), who would be tenant in common with C. (Wills Act, s. 33), as D. being a child of the testator leaving issue living at his death, there will be no lapse. F. being a nephew only, his share of Whiteacre will lapse and will go to the residuary devisee, X., who would be tenant in common of the estate with C., the surviving nephew.

Q.—If Blackacre were wished to be devised to B. in trust for two infant children in moieties, but so that in case of the decease of one before the testator the surviving child is to take the entirety—how is that to be accomplished?

A.—The property should be devised to trustees in trust for the two infant children as tenants in common, with an executory devise over to the survivor and his issue in case one of them should die before the testator. This would give them equal moieties in Blackacre with cross-remainders between them: (see Burt. Comp. 670; 1 St. C. 35, &c., 8th edit.)

Q.—An estate, consisting partly of freehold and partly of leasehold, is devised to A. for life, with remainder to B. for life, with remainder to the heirs of the body of A. What interest does A. take in the freehold and leasehold respectively?

A.—A. will take an estate tail in the freeholds under the rule in *Shelley's case*; subject, of course, to B.'s life estate: (see Will. R. P. 255, 258, 13th edit.) As to the leaseholds, the rule in *Shelley's case* does not apply, but A. will take them absolutely, subject, however, to B.'s interest in case he survives A.: (*Leventhorpe v. Ashbie*, L. C. Conv. 700; Burt. Comp. 954.)

Q.—A testator devises and bequeaths all his residuary real and personal



estate to your client for his life, with remainder to his issue and their heirs; what estate does he take in the realty and personalty respectively?

A.—As in devises of real estate the word “issue” is *prima facie* a word of limitation, A. takes an estate tail in the realty: (*Roddy v. Fitzgerald*, 6 H. of L. 823.) But it is not so in wills of personalty, in which he will take an estate for life only: (*Ex parte Wynch*, 5 De G. M. & G. 188.)

Q.—If a will devises property to A. for life, with remainder to B. for life, with remainder to B.’s first and other sons successively in tail, and B. dies between the making of the will and the death of testator, what effect would that death have on the devises, and how would the property go?

A.—It would seem that B. takes an estate tail, the word “sons” being equivalent to words of limitation (see *Robinson v. Robinson*, 1 Burr. 38); but that is not material in this case. If B. leaves any sons living at the testator’s decease, they will take the estate subject to A.’s life estate: (Jarm. Wills, ch. 38, vol. 2; Hayes & Jarm. Conc. Wills, 72 *et seq.*) 6th edit.)

Q.—Where a testator bequeaths property or money to be divided equally between his brothers and sisters, and the children *per stirpes* of any brother or sister who may die in his lifetime, will the children of a brother who had died before the date of the will participate?

A.—It was so held by Vice-Chancellor Malins in *Adams v. Adams* (L. Rep. 14 Eq. 246), but the cases are not consistent. Probably the true rule is that pointed out by James, L.J., when V.C., in *Re Hotchkiss* (8 Eq. 643), that the children will take where there is an immediate gift to them, but not where they are merely substituted for their parent.

Q.—State shortly the usual form of a will of a married man with a family engaged in business, entitled to freehold property and personalty, and the proper provisions.

A.—An immediate legacy should be given the wife, and any specific or pecuniary legacies that may be desired; the remainder of the property should be devised to trustees upon trust to sell and to invest proceeds, after payment of debts and legacies, in such stocks, &c., as may be desired, and upon trust to pay interest, &c., to wife for life or remarriage, with power of appointment amongst the children, or in default equally amongst them. Powers of advancement (with consent of wife whilst living) to the extent of half presumptive shares, and power of maintenance, should also be given. Power to carry on the business should be inserted when desired. A power to appoint new trustees should be inserted. The wife should be appointed guardian to any of the infant children. Executors should be appointed, and the will executed in the presence of two disinterested persons, and properly attested.

Q.—What provisions formerly contained in a well-drawn will may be dispensed with in ordinary cases since the statutes 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 145?



**A.**—Where the estate is devised subject to payment of debts and legacies—

A power of sale is now given by sect. 14 of first Act.

A power to give receipts is now given by sect. 23, *ib.*

Trustee indemnity clauses need not now be inserted : (sect. 31, *ib.*)

Powers of investment are given by sect. 32, *ib.*

Under the latter Act (Lord Cranworth's) it is sufficient to give trustees a power of sale and exchange, when the Act gives them all usual powers connected therewith : (Part 1 of the Act.)

A power of maintenance is given by sect. 26.

A power of appointing new trustees is given by sect. 27.

And a power to executors to compound debts is given by sect. 30.

Fuller provisions are substituted by 44 & 45 Vict. c. 41, ss. 31-37 and 43, in respect of instruments coming into operation after the 31st December, 1881, sections 11 to 30 of Lord Cranworth's Act being repealed as to these.

**Q.**—What is a vested and what a contingent legacy ?

**A.**—A legacy is said to be *vested* when the words of the testator convey a present or immediate interest to the legatee in the legacy ; but if the legacy is only given on the happening of some contingency, as *if* the legatee attains twenty-one, it is contingent, and if the legatee dies before that age, the legacy lapses : (Holth. L. D. 2nd edit. ; Matt. Exors. 184, 2nd edit.)

**Q.**—A. by his will gives and bequeaths a legacy of 200*l.* to B. (a stranger), and directs his executors to pay it on B.'s attaining twenty-one, B. dies under twenty-one, and after the death of A. Who is entitled to the legacy, and why ?

**A.**—B.'s administrator will be entitled to the legacy. For a bequest to A., "to be paid," or "payable" *at* or *when* he attains twenty-one (or any other time mentioned), is vested. But if it be a bequest "to A. *at* twenty-one," or "*if*," &c., he attains twenty-one, it is contingent.

If the testator intended that the legatee should at all events have the legacy, but that he should wait for it until the time named, it is a vested interest, and he may dispose of it before that time ; the interest commences *in præsenti*, although it be *solvendum in futuro* ; but if the testator meant that there should be no gift at all unless the object of his bounty lived to the time named, it is contingent : (see Matt. Exors. 184, 2nd edit. ; 2 St. C. 205, 8th edit.)

**Q.**—What is the difference between a general and a specific legacy, and what are the incidents attached to each kind ? and give an example of each.

**A.**—A specific legacy is a gift of a specified part of a testator's estate ; a general legacy is not so distinguished. The incidents of specific legacies are that they have priority over general legacies in administration of assets, and do not abate except for payment of debts, but they are liable to ademption. A general legacy cannot be lost by ademption, but if there is insufficient to pay the whole of the legacies bequeathed by the will, general legacies abate rateably, and they will all be applied in payment of debts before the specific legacies are affected. The bequest of a

diamond ring is a general legacy, and will be satisfied with the delivery of any diamond ring; but a bequest of "the diamond ring presented to me by A." is a specific legacy, and can only be satisfied by the delivery of the particular ring: (Matt. Exors. & Adms. 180, 181, 2nd edit.)

**Q.**—Distinguish between accumulative and substitutional legacies. What are the rules of equity in regard to them?

**A.**—An accumulative legacy is where by the same or a subsequent instrument an additional provision is made for the legatee, whilst a substitutional legacy is one given in lieu of a previous one. In absence of a contrary intention, if a legacy of the same amount be repeated in two separate testamentary instruments, as a will and codicil, *primâ facie* the legatee is entitled to both legacies: (*Hooley v. Hutton*; see *Ridge v. Morrison*, 1 Bro. C. C. 389; *Hurst v. Beach*, 5 Madd. 358.)

But if the repetition occurs in one and the same testamentary instrument, *primâ facie* the legatee is entitled to one legacy only: (*Garth v. Meyrick*, 1 Bro. C. C. 30; *Holford v. Wood*, 4 Ves. 75; *Manning v. Thesiger*, 3 Myl. & K. 29; see Hawkins' Const. of Wills, p. 303.)

**Q.**—What are the advantages of general over specific legacies, and what are the disadvantages?

**A.**—A general legacy not being a gift of a specified part of the testator's personal estate, cannot be lost by ademption, as a specific legacy may, which being a gift of a specified part of the testator's property, cannot pass to the legatee unless the specific chattel be in the testator's possession at his death. On the other hand, specific legacies have priority over general legacies in the administration of assets, and do not abate except for payment of debts: (Will. P. P. 385, 10th edit.)

**Q.**—Define a demonstrative legacy, and compare its incidents with those of general and specific legacies as regards abatement and ademption.

**A.**—A demonstrative legacy is a gift by will of a certain sum directed to be paid out of a specific fund: it is not liable to ademption, and abates before a specific legacy. A general legacy is liable to abatement in case of a deficiency of assets to pay the testator's debts and other legacies, but it is not liable to ademption. A specific legacy has priority in case of deficiency of assets, but is liable to ademption: (Wms. P. P. 385, 10th edit.)

**Q.**—How should a legacy of stock in the funds be bequeathed so as to make it a specific and not a general legacy?

**A.**—The bequest must so identify the stock that it could not apply to any other. Thus, a bequest of "100*l.* Consols now standing in my name at the Bank of England," is a specific legacy. But a bequest of "100*l.* Consols," simply, would be a general legacy: (Will. P. P. 385, 10th edit.)

**Q.**—A testator possessed of 1000*l.* 3 per cents., and 3000*l.* Reduced 3 per cents., made the following bequests:—"I give all that my sum of 1000*l.* Consolidated 3 per cents. to A. I give the sum of 1000*l.* Reduced 3 per cents. to B." The testator afterwards sold all his Consols and Reduced and died. What are the positions of A. and B. respectively under the bequests in their favour?

**A.**—The gift to A. of my “1000*l.* Consols” being specific, is adeemed by the subsequent disposition of the fund by the testator in his lifetime. The gift to B. of 1000*l.* Reduced, being general, is not liable to ademption, and B. is therefore entitled to have that amount of stock (subject to payment of duty) transferred to him by the executors.

**Q.**—Bequest of legacy to “A., his executors, administrators, and assigns.” A. dies in the testator’s lifetime; does the legacy lapse? And what would be the result if the bequest had been to “A. or his executors or administrators?”

**A.**—Bequest to “A., his executors, administrators, and assigns,” would lapse, unless A. were issue of testator, and died leaving issue living at testator’s death.

Bequest to “A. or his executors or administrators” would go to his personal representatives: (see Hawkins on Wills, p. 246, and cases there cited.)

**Q.**—A testator bequeaths the residue of his personal estate to several persons as tenants in common; one of the residuary legatees (not being a son or other issue of the testator) dies in the lifetime of the testator; what becomes of his share?

**A.**—His share will lapse, and go to the next of kin of the testator. But it would have been otherwise if given to the residuary legatees as joint tenants. And even when it is given to tenants in common, if described in general terms only, and as constituting a class, there is no lapse: (Burt. Comp. 276-278; *Ackroyd v. Smithson*, L. C. Eq. vol. 1.)

**Q.**—If there be a bequest of the residue of personal estate to testator’s wife for life, and afterwards to the relations of the testator, what person or persons will take under the description of relations?

**A.**—A bequest to relations extends to all who would have been entitled under the Statute of Distribution, in case of an intestacy: (Matt. Exors. 178, 2nd edit.)

**Q.**—Suppose an annuity is given by will to A. indefinitely, does he take it for life or in perpetuity?

**A.**—He takes it for life only: (see *Kerr v. The Middlesex Hospital*, 22 L. J., N. S. 355; 1 Sm. Comp. 9, 4th edit.)

**Q.**—If a testator gives an annuity, and directs a sufficient principal sum to be appropriated by his executors to purchase the annuity, but the intended annuitant demands the principal of the executors; can this demand be resisted, and if not what precautions should be taken in the will to prevent the possibility of this occurring?

**A.**—In the case put the annuitant may demand the principal, as he has a vested interest therein. And this right cannot be negatived by express declaration in the will that the annuitant shall not have the value: (*Stokes v. Cheek*, 29 L. J., N. S. 292, Ch.) There should be a provision that if the annuitant attempted to assign, charge, or incumber the annuity, it should cease and form part of the residue: (Hayes & Jarm. Conc. Wills, 181, 182, 6th edit.)

**Q.**—An annuity of 60*l.* a year was bequeathed by a testator to his son F. out of a certain stock, and the annuity was directed not to be

sold until after F. and his wife's death, nor until F.'s sons should attain twenty-one. Was the annuity so given limited to F.'s life, or did he take a perpetual annuity by the bequest? Give the reason for your answer.

A.—This would be a perpetual annuity; for it has been decided that where a testator directs the *corpus* of his property, or a portion of the *corpus*, to be applied for the purpose of purchasing or providing an annuity of a certain amount without indicating that such annuity is to be of *less duration*, the annuitant will be entitled to a perpetual annuity: (see the cases collected in 1 Pet. Abr., *in notis*, p. 362, 2nd edit.)

Q.—An annuity, arising out of personalty, is granted by deed to B. and his heirs; by what instruments can he dispose of it, and who is entitled to it in case of his intestacy?

A.—B. can dispose of the annuity by deed or will as he thinks fit, but if he die intestate the annuity will pass to the heir and not to his personal representative: (Wms. P. P. 11th edit., p. 235.)

Q.—A., by his will, gives certain annuities "charged upon all my real and personal estate," but in other respects dies intestate; his nearest surviving relations are a nephew and niece (children of a deceased sister), and two aunts on the father's side. How does the property, real and personal, devolve, and with what liability with regard to the annuities?

A.—The real estate will descend to the nephew, and the personalty will be equally divided between nephew and niece. The annuities will be primarily payable out of the personalty, as it cannot be inferred that the testator intended to create a mixed fund: (see *Roberts v. Walker*, 1 Russ. & My. 752; *Boughton v. Boughton*, 1 H. L. C. 406; and *Allan v. Gott*, 7 Ch. App. 444.)

Q.—What is an executory devise?

A.—It is such a limitation of a future estate or interest in property as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law. As, if lands be devised to A., an infant, and his heirs, but in case A. should die under the age of twenty-one years, then to B. and his heirs. This remainder, though void in a deed which operates by virtue of the common law, is good at law by way of executory devise: (see Will. R. P. 316, 13th edit.; 1 St. C. 611, &c., 8th edit.)

Q.—Give three instances of an executory devise.

A.—A devise of lands to A., an infant, and his heirs, but in case A. should die under the age of twenty-one years, then to B. and his heirs; here B. has an executory interest. So a devise to the heirs of J. S., after the decease of J. S.; or to B. and his heirs, to commence and take effect six months after the testator's decease, are both instances of executory devises: (see Fearne, Cont. Rem. 386, 395, &c.)

Q.—Within what time must it be provided that the contingencies of an executory devise shall happen?

A.—Within the period of any fixed number of existing lives, and an additional term of twenty-one years; allowing further for the period of

gestation, should gestation actually exist: (Will. R. P. 319, 13th edit.; 1 St. C. 553, and note, 8th edit.)

**Q.**—Give your opinion on the validity or otherwise of the devise of his Norfolk estate, made by John Horncastle, in the following words: “I devise my freehold estate at Earlham, in the county of Norfolk, to my nephew Alexander Swede for his life, and from and after his decease I give the same estate to such of the sons of the said Alexander Swede as shall attain the age of twenty-five years, in equal shares as tenants in common;” and state your reasons for your opinion, with some account of the rules of law on which it is founded.

**A.**—As a contingent remainder it may be good if there are any sons aged twenty-five at Alexander’s death (Wms. R. P. 273, 13th edit.), but as an executory devise over to the children of Alexander Swede attaining twenty-five it is void, as it infringes the rule against perpetuities, which, as the law now favours the free disposition of all kinds of property, prevents real estate being tied up for longer than lives in being and twenty-one years after, allowing for gestation, if it exists: (see *Cadell v. Palmer*, 7 Bligh, N. S. 202.)

**Q.**—Gift of real and personal property by will to trustees, upon trust for A. for life, and after his death for such of his children as shall attain the age of twenty-five years. A. has three children at testator’s death, and has afterwards four more. Is the trust good as to all or any of the children?

**A.**—As the estate thus given to the children exceeds the limit allowed by the rule against perpetuity, it is void altogether (Will. R. P. 320, 13th edit.), and the rule applies equally to personal estate: (Will. P. P. 306, 10th edit.)

**Q.**—Freeholds of inheritance are devised unto and to the use of A. and his heirs, but if he shall die without issue living at the time of his decease, to A.’s sisters in fee; what estates do A. and his sisters take respectively in such freeholds?

**A.**—A. takes the fee simple, with an executory devise over to A.’s sisters in fee, in the event of his dying without issue living at his death: (1 Jarm. Wills, 519, 524, 3rd edit.) But when the executory limitation comes into operation after 1882 the gift over will become void on A. having any issue who has attained twenty-one years: (45 & 46 Vict. c. 39, s. 10.)

**Q.**—State, in a general way, the origin, whether by common law, or decision, of the rule for prevention of remoteness, under the name of the rule against perpetuities, and give in definite terms that rule, stating within what period, reckoning from what time executory interests, other than those in remainder after an estate tail, must vest in right if at all.

**A.**—The rule against remoteness is established by numerous decisions: (see *Cadell v. Palmer*, L. C. Conv. 331, and cases there cited.) This rule, called the rule against perpetuities, prohibits real or personal property from being tied up for a longer period than the lives of existing persons, and twenty-one years after their decease, allowing a further time for

gestation if it actually exists. (a) An executory devise must also vest within the same period. The period allowed for vesting is computed in the case of a deed from its date, and in the case of a will from the death of the testator: (see 1 St. C. 552, 554, n., 8th edit.)

Q.—State fully the four periods during which the accumulation of the profits of real or personal property can be made, or any of them, correctly. And give the exceptions.

A.—The four periods are (1) during the life of the grantor or settlor, or (2) twenty-one years from the death of such grantor, settlor, deviser, or testator, or (3) during the minority of any person living, or in *ventre sa mère* at the death of such grantor, settlor, deviser, or testator, or (4) during the minority only of any person who, under the settlement or will, would for the time being, if of full age, be entitled to the income so directed to be accumulated: (39 & 40 Geo. 3, c. 98, the Thellusson Act.)

But the Act does not extend to any provision for payment of debts, or raising portions for children, or touching the produce of timber or wood: (Will. R. P. 322, 13th edit.)

Q.—If the trust as created should exceed the period beyond which accumulations of the income of trust property are by law prohibited, will it fail altogether, or how otherwise?

A.—It has been held that a disposition exceeding the limits allowed by the Act is only void for the excess beyond twenty-one years. But if the direction to accumulate should exceed the limits allowed by law for the creation of executory interests it will be void altogether, independently of the above Act: (see *Griffith v. Vere*, L. C. Conv. 300, *in notis*; Will. R. P. 323, 13th edit.)

Q.—In case of a will coming within the new Wills Act (1 Vict. c. 26), and containing a residuary devise, how will void accumulations directed to be made out of real estate, pass?

A.—The residuary devisee, and not the heir, will be entitled; unless it be the residue itself that is directed to be accumulated, for then the heir-at-law will take the accumulations: (Jarm. Wills. 292, 3rd edit.)

Q.—In regard to what are called precatory or recommendatory words or expressions of belief or confidence, in a devise, state, as far as you may have considered the subject, the rules for determining their import; that is, what class of words, in a general sense, create a trust, and what not.

A.—As a general rule, expressions of recommendation or confidence, or precatory or expressing hope, are considered to create trusts, if (1) the object and subject of the supposed trust are definite, and (2) if it can be gathered from the whole will and the previous conduct of the testator that the expressions appear to be imperative. But if the object or subject is not definite, or if a discretion is given to the devisee, no trust is raised: (see St. Eq. §§ 1018 a, 1070.)

Q.—What is mortmain?

A.—The word mortmain comes from the French *mort*, death; and

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(a) The following question, although somewhat ambiguously framed, is required by the examiners to be answered in the same manner as this part of the text: What is the longest period within which alienation of land or personal property is limited?



*main*, hand. Purchases by corporate bodies are said to be purchases in mortmain; seemingly so called because these purchases were originally generally made by ecclesiastical bodies or corporations, the members of which were reckoned dead in law; and the lands belonging to such bodies produced no advantage to the feudal lord by way of escheat or otherwise: (Holth. L. D. 2nd edit.; 1 St. C. 356, 455, 8th edit.)

**Q.**—What is the meaning of the term “mortmain,” and why is it an inaccurate form of expression to call the statute 9 Geo. 2, c. 36, the Statute of Mortmain?

**A.**—As to the meaning of the word see *suprà*. The term is inaccurate because the statute was not intended to prevent the alienation of lands in mortmain. Its object was to prevent gifts of certain classes of property by will to charities.

**Q.**—State shortly the law with regard to gifts in mortmain.

**A.**—That no land, money, stock, or other personal estate to be laid out in purchase of lands, can be given to a charity unless it be by deed, executed in the presence of two credible witnesses and enrolled in Chancery within six months after its execution, to take effect in possession, &c.; and unless made for valuable consideration it will be void if the grantor dies within twelve months, (a) and such stock must be transferred six months before death of donor except the transfer is for value. A nominal rent, right of way, minerals, or an easement may now be reserved, provided the same benefit is reserved to the representatives of the grantor as to himself, and the consideration may consist of a rent-charge. By the Public Parks, Schools, and Museum Act, 1871 (34 Vict. c. 13), gifts of land for a public park, a school house or a public museum will be valid, provided the will or deed (if not made for valuable consideration) be made twelve months before the death of the testator or grantor, and enrolled in the books of the Charity Commissioners within six months of its coming into operation; but the gift by will must not exceed twenty acres for a park, two acres for a museum, and one for a school house: (Will. R. P. 69, 13th edit.)

**Q.**—What was the date and purpose of the original Statute of Mortmain? What is the statute of recent date, and what did it enact?

**A.**—The original Statutes of Mortmain were passed in Edward the First's reign (7 Ed. 1 & 13 Ed. 1, c. 32), the purpose of them being that lands should not be conveyed to religious houses, unless the licence of the Crown were duly obtained. There have been several Acts since passed relating to mortmain, the principal being the 9 Geo. 2, c. 36, set out above. Certain foundations are excepted. This Act has since been amended by 24 Vict. c. 9, 31 & 32 Vict. c. 44, and 34 Vict. c. 13: (Will. R. P. 69, 71, 13th edit.)

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(a) By the 9 Geo. 2, c. 36, *bond fide* conveyances for valuable consideration are not to be avoided by the death of the donor or grantor before the twelve months have expired: (see also hereon 9 Geo. 4, c. 85.) A rent or other annual payment reserved to the grantor or other person is equivalent to a consideration of a sum of money: (27 Vict. c. 18, s. 4.) The time for enrolment may be enlarged on application to the Court of Chancery: (29 & 30 Vict. c. 57.)

**Q.**—State the cases, if any, in which a valid gift of land for charitable uses may be made by will.

**A.**—See *supra*.

**Q.**—Would lands already appropriated to charitable uses require the same formalities if they were conveyed to trustees of another charity?

**A.**—No; the formalities required by the Act of Geo. 2 need not be observed, as the land is already in mortmain: (3 Pet. Abr. 73, *in notis*, 2nd edit.)

**Q.**—A testator possessed of money in the funds, money out on mortgages of freehold and leasehold estates, railway shares, and other effects, desires to bequeath a legacy to a hospital; how ought the will to be framed to render the bequest effectual?

**A.**—The will should be framed so that the bequest should be payable out of the *pure* personalty, *i.e.*, the money in the funds or other effects (see Rop. Leg. 670, 4th edit.; Matt. Exors. 175, 2nd edit.); and the railway shares, unless the Act or charter of incorporation declares them realty: (*Edwards v. Hall*, 25 L. J., N. S. 82, Ch.; 4 W. R. 111.) The bequest cannot be paid out of the money lent on mortgage, as that savours of realty: (Matt. *ubi sup.*) Railway Debenture Stock is not pure personalty: (*Attree v. Hawe*, 9 Ch. Div. 337.)

**Q.**—A testator being possessed of (1) fee simple lands, (2) stocks in the funds, (3) mortgages of freehold interests in lands, (4) mortgages of leasehold interests in lands, (5) furniture, (6) money at his bankers, and (7) money owing to him in business, devises and bequeaths all his real and personal property to trustees to be divided amongst charitable institutions. State if the will will take effect as to the whole property, or if not as to what parts it will be inoperative, and why?

**A.**—By the Mortmain Act, 9 Geo. 2, c. 36 (see *ante*), only the pure personalty, *i.e.*, (2) stock in the funds, (5) furniture, (6) money at his bankers, and (7) money owing to him in business, will be divided amongst the charitable institutions.

**Q.**—What is necessary to the validity of a conveyance of a fee simple estate in land for the endowment of an almshouse?

**A.**—The provisions of the Mortmain Act must be complied with: (see *ante*.)

**Q.**—What evidence is required to set aside a will of lands on the ground of the existence of a secret trust for charity?

**A.**—It must be shown that the devisee consented to hold the lands in trust for the charity.

**Q.**—A. contracts to sell his fee simple estate, but dies before completion of sale, having made his will giving the purchase money to a charity. Is the gift good? Give a reason or authority for your answer.

**A.**—The gift or bequest of unpaid purchase money to a charity is a void gift; because the lien which the testator (late vendor) has for it on the estate brings it within the Statute of Mortmain (9 Geo. 2, c. 36), being an interest in land: (*Harrison v. Harrison*, 1 Russ. & Myl. 71; Sug. Conc. V. 123.)

**Q.**—In what circumstances does money savour of realty?

**A.**—When it is directed to be laid out in the purchase of land; or for the purposes of the Mortmain Act, where it is in any case charged upon land—as money due on mortgage, or the unpaid purchase money of an estate, or the produce of real estate directed to be sold.

**Q.**—Can money be bequeathed by will to be laid out in the purchase of land to be settled to charitable uses?

**A.**—Money cannot be bequeathed by will to be laid out in the purchase of land to be settled to charitable uses: (9 Geo. 2, c. 36; *et sup.*)

**Q.**—Can gifts of money be made to a charitable society by will? If so, give the form of bequest by will.

**A.**—Money may be given by will to a charitable society already existing. The form of bequest might run thus: “I give the sum of 1000*l.* to the treasurer for the time being of ——— Hospital, situate at ———, in aid of that institution; and I direct that the said legacy shall be paid exclusively out of such part of my personal estate as may lawfully be appropriated to such purpose in preference to any other payment thereout. And I direct that the receipt of such treasurer shall be a sufficient discharge for the same”: (Hayes & Jarm. Conc. Wills, 185, 195, 6th edit.)

**Q.**—Does a will executed (since the late Statute of Wills) in the presence of two witnesses pass real estate in the British Colonies or any of them?

**A.**—In all the colonies except Lower Canada, British Guiana, the Cape, Ceylon, Trinidad, St. Lucia, and Mauritius, real property is subject to the power of disposition, which the law authorised before the passing of the Statute of Wills. This statute will not be in force in the colonies until it is adopted by their legislature. Where, therefore, the testator has colonial property, the attestation (to the will) should in most cases contain the word “published,” and there should be three witnesses: (see Brow. R. P. Stats. 204. As to personalty see 24 & 25 Vict. c. 114; *et infra.*)

**Q.**—In regard to the Act of 1861, “to amend the law with respect to the Wills of Personal Estate made by British Subjects,” in case of the will made out of the United Kingdom of a British subject dying after that Act, by the rule of what country must the will be executed? and in what respect is there any and what option? and is or not the will of a British subject made in the United Kingdom affected by his domicile?

**A.**—Now, wills made abroad by a British subject (whatever may be his domicile) are, as regards *personal* estate, held well executed if made according to the forms required either (1) by the law of the place where made, or (2) the law of the place where the person was domiciled when the will was made, or (3) the law then in force in that part of Her Majesty’s dominions where he had his domicile of origin: (24 & 25 Vict. c. 114, s. 1.)

And wills of personal estate made within the United Kingdom by a British subject (whatever his domicile) are good if executed according to the forms required by the laws then in force in that part of the kingdom where the will was made: (sect. 2; see also 24 & 25 Vict. c. 121.)

**Q.**—A man is born of English parents in England, but goes to reside in France with the intention of remaining there permanently, and he thus obtains a French domicil. He afterwards leaves France, intending never to return, but without any definite views as to his future residence. He travels about for a time on the Continent, in the course of which travels he dies. What is his domicil at the date of his death, and why?

**A.**—His domicil is English, as, on giving up his new domicil, he reverts to his domicil of origin: (see *Haldane v. Eckford*, L. Rep. 8 Eq. 631; *King v. Foxwell*, 3 Ch. Div. 578.)

**Q.**—You are required to prepare the will of a client; his property consists of 5000*l.* in the funds, and a freehold estate of 5000*l.* a year. He wishes to leave a life interest in the whole to his wife, to secure 20,000*l.* to his younger children, and to make a strict settlement of the freehold estate upon his eldest son and his issue. What would be the best mode of carrying the testator's intentions into effect by a will?

**A.**—The whole must be devised to trustees upon trust to pay the rents, dividends, and proceeds to the wife during her life; and, after her death, upon trust to raise sufficient to satisfy the provisions for the younger children; and subject thereto, to the eldest son for life, with remainder to his first and other sons in tail; remainder to his daughters in tail as tenants in common, &c., with remainders over according to the testator's directions: (see 2 Prid. Conv. 448, &c., 9th edit.)

**Q.**—Give a sketch of a will of a gentleman possessing only personalty, who desires to leave the whole to his wife for life; and after her death to his children (some of whom are minors) absolutely in equal shares.

**A.**—Bequeath the property to trustees upon trust to sell and convert the same into money, and invest, and vary investment if necessary, and pay the annual income to the wife for her life, and after her death in trust for testator's present and future children, sons at twenty-one, daughters at that age or marriage, in equal shares, and shares of those dying before these events happen to go to survivors. Powers for trustees to apply income of any child's share for his or her maintenance, &c., until above events happen, and to accumulate surplus income, if any. Also a power to advance any child, if necessary. Usual trustees' clauses may be added, but these (as also the power of maintenance) are now provided for by several Acts of Parliament: (see Hayes & Jarm. Conc. Wills, 250, 6th edit.)

**Q.**—A. is entitled to real estate to the value of 5000*l.* per annum for his life, with remainder to his first and other sons in tail male, remainder to his daughters as tenants in common in fee. The estate is charged with a jointure of 800*l.* a year for his widow, and with a sum of 20,000*l.* for his younger children. A. has also personal estate of the value of 100,000*l.* A. has a wife and has four sons and three daughters, all infants. How would you, if consulted, advise him to dispose of his property by will?

**A.**—The eldest son is already provided for, but it will be desirable to get rid of the charge upon the realty of the 20,000*l.* The furniture, plate, &c., should be given to the widow, and her jointure increased to say) 1000*l.* a year. The 100,000*l.* should be vested in trustees upon

trust to invest, &c., for testator's present and future young children in equal shares, sons at twenty-one, daughters at that age or marriage (for separate use), and that the shares of any dying before these events happen should go to survivors, with a declaration that the bequest was made upon condition that the younger children should release the real estate from the 20,000*l.* Then follow the usual maintenance, education, and advancement clauses. Also, if thought fit, for appointment of new trustees, and to give receipts.

*Q.*—*A.*, having no realty, makes a will, giving all his personal property equally between his two children, a son and a daughter. He afterwards makes an agreement to purchase freeholds. What advice should thereupon be given to him by his solicitor with reference to his will?

*A.*—The solicitor should inform his client that, as the will is framed only to pass personal estate, his intention of equally dividing his property between his two children will be defeated unless he alters his will so as to meet the new form of property acquired; for of course the newly-purchased realty would descend upon the son as heir-at-law, even before the conveyance was complete; but 30 & 31 Vict. c. 69, s. 2, would now remedy this unless a contrary intention appeared in the will.

*Q.*—A gentleman has four sons, John, James, Arthur, and Joseph. The two elder sons, John and James, are married. John has two sons, Alfred and Peter, and James has one son, William. The gentleman desires to devise his real estate in strict settlement. Give an abstract of the proper limitations.

*A.*—The lands should be devised to trustees upon trust for the son John for life (with pin-money and jointure for his wife, and portions for younger children), remainder to the use of his son Alfred and the heirs of his body issuing; and in default of such issue to the second son Peter, and every other son of the body of the said John to be begotten severally, successively, and in remainder, one after another in order as they are in priority of birth, and the heirs of the body and respective bodies of all and every such son and sons issuing, &c.; and in default of such issue to the daughters as tenants in common in tail, with cross-remainders between them, remainder to the use of the other sons of the testator, upon similar limitations: (Ld. St. Leonards' Handy Book, 115, 6th edit.; 2 Prid. Conv. 237, 4th edit.)

*Q.*—State the principal enactments of the Wills Act of January, 1838, with the alterations in the old law effected thereby.

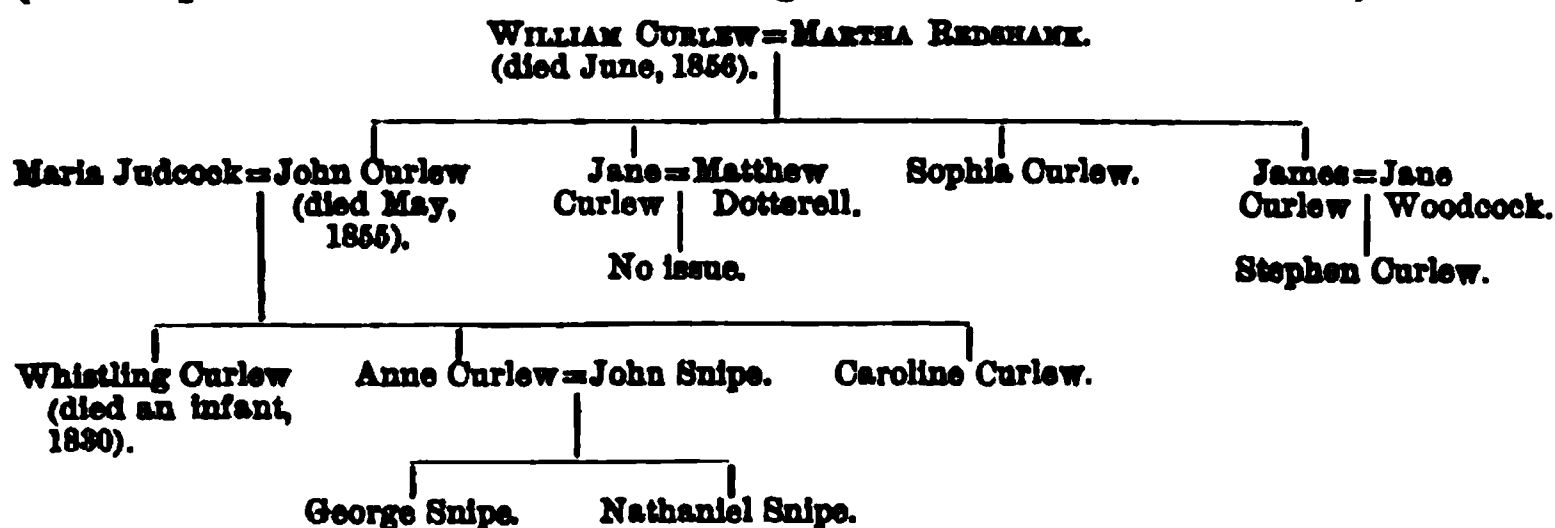
*A.*—In addition to what has been said previously, as to the alteration in mode of execution and revocation, the will speaking from the death, and lapsed devises falling into the residue, &c., &c., we may add that publication is no longer a requisite; that the words "die without issue," &c., are now to mean dying without issue living at the death of the party, and not an indefinite failure of issue, unless a contrary intention appears: (see 1 Vict. c. 26, and Brow. R. P. Stats., *et ante.*)

# INTESTACIES.

**Question.**—What is the meaning of the term “dying intestate?”

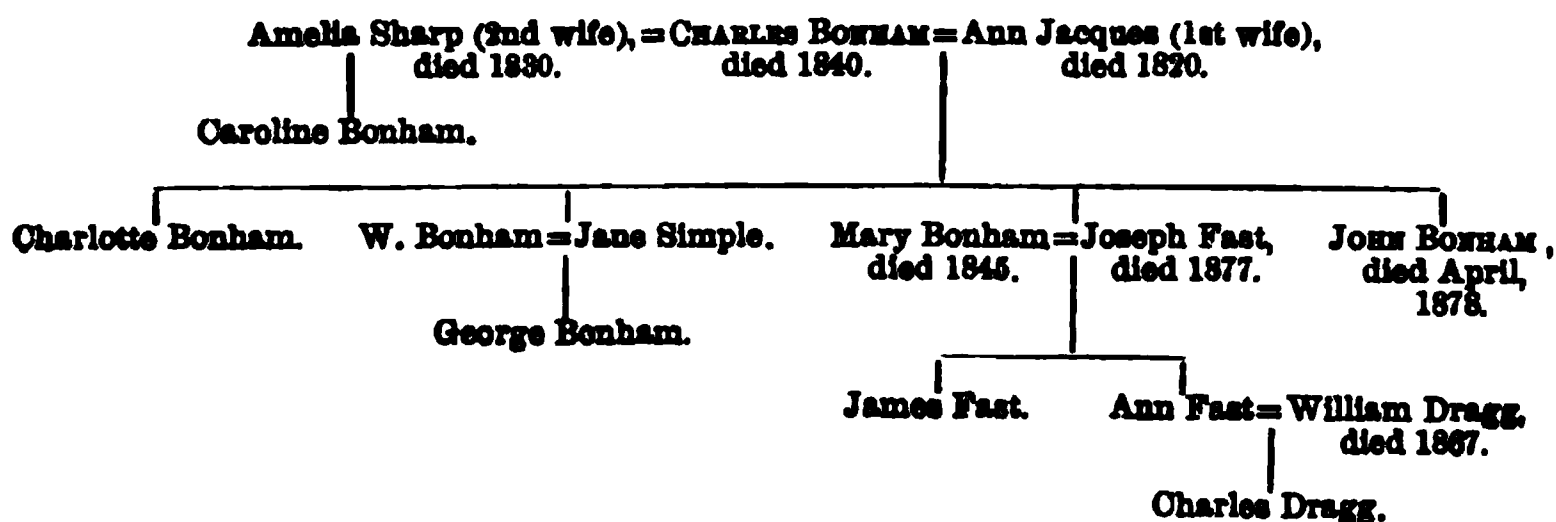
**Answer.**—The meaning of the term “dying intestate” is dying without making a will: (see Holth. L. D. 2nd edit.)

**Q.**—Find the heir or heirs of William Curlew in the subjoined pedigree (all the persons named in it are living whose death is not stated):—



**A.**—Here Anne Snipe and Caroline Curlew, the daughters of John Curlew, deceased, the eldest son, are the co-heiresses of their grandfather. William Curlew—as the lineal descendants *in infinitum* of any person deceased represent their ancestor: (Fourth Rule of Descent; Wms. R. P. 105, 13th edit.)

**Q.**—Find the persons entitled to share in the net residue of the personal estate of John Bonham in the subjoined pedigree—all persons named in it are living whose death is not stated—John Bonham died intestate and unmarried:—



**A.**—The half-blood take the same as the whole. Caroline Bonham, Charlotte Bonham, and W. Bonham take one-fourth each of the residue, and James Fast and Ann Dragg the remaining fourth between them.

**Q.**—If a man die intestate, leaving a wife and children, how is his personal estate to be distributed?

**A.**—One-third to the wife, residue to the children equally: (Stat. Distr. 22 & 23 Car. 2, c. 10; and for a Table of Distributions, see Alln. Wills & Adms. 3rd edit.; Coote's Prob. Pr. 88, 6th edit.)

**Q.**—If he leaves no children, but a widow, a brother, and children by another brother or sister, how is the personal estate distributed?

**A.**—Half to the widow, residue to the brother and children by another



brother or sister, the children taking *per stirpes*: (see Coote's Prob. Pr. 88, 6th edit.)

**Q.**—If a person die intestate, leaving a widow, one child, the children of a deceased child, and a brother and sister, in what manner will the intestate's personal estate be distributed?

**A.**—The widow is entitled to one-third, and the child and grandchildren take the residue, the grandchildren taking *per stirpes*: (22 & 23 Car. 2, c. 10; Coote, *sup.*)

**Q.**—Specify some of the disadvantages which result from the owner of personal estate dying intestate instead of testate.

**A.**—1. Formerly the person so dying impoverished his estate; for the duty on letters of administration, where there was no will, was after a higher rate than the duty on probates, or letters of administration, with the will annexed, but this is no longer so since 44 Vict. c. 12. 2. The very persons, or some of them, may take the estate the intestate most wished should not do so. 3. The next of kin may be minors or abroad. 4. The interest of such as are daughters will be without fetter, and subject to the control and liabilities of their husbands, if married before the 9th August, 1870: (33 & 34 Vict. c. 93, *et ante.*) 5. No provisions for sale and conversion and investment according to the deceased's wishes can be effected, &c.

**Q.**—An intestate dies without leaving a widow, or any issue, leaving nephews, the children of a deceased brother or sister of the intestate, and great-nephews, the descendants of another deceased brother or sister of the intestate; who are entitled to share in the distribution of the personal estate?

**A.**—The nephews will be entitled to the intestate's personal estate, and the great-nephews will be wholly excluded. Because the 22 & 23 Car. 2, c. 10, s. 7, provides "that there be no representation admitted among *collaterals* after brother and sister's children:" (see Alln. Wills & Adms. 372, 379, 3rd edit.; Coote's Prob. Pr. 88, 89, 6th edit.)

**Q.**—A. dies intestate and unmarried, leaving a mother, two brothers both under age, and one adult sister; who is entitled to a grant of letters of administration to A.'s effects? and in what proportion is A.'s personal estate divided amongst his next of kin?

**A.**—The mother is entitled to letters of administration, having a title paramount to the brothers and sister, who are related only in the second degree. The effects will be divided into four equal parts, and go equally amongst the mother, brothers and sister: (Dodd & Brook's Prob. Pr. 413, 509.)

**Q.**—A. dies without issue intestate, leaving a mother, widow, two younger brothers, three sisters, and a nephew and niece, children of his eldest brother, deceased; upon whom, and in what proportions, will his real and personal estate devolve?

**A.**—The nephew, son of the intestate's eldest brother, will take the real estate, under the 4th rule or canon of the law of inheritance, subject to the widow's right to dower if not barred. The personalty will be distributed in the following shares: The widow will take a half; and the

remaining half will go to the mother and the two brothers, the three sisters and the nephew and niece equally; the nephew and niece, however, will only take their deceased parent's share: (see 22 & 23 Car. 2, c. 10; Coote Prob. Pract. 88-90, 6th edit.)

**Q.**—A. dies intestate, possessed of 20,000*l.* personal estate, leaving a widow, a son, and a daughter—upon the marriage of the daughter he had given her 2000*l.* as a marriage portion; and he had expended 3000*l.* in purchasing a partnership for his son: how should the 20,000*l.* be divided by the administrator?

**A.**—Before children advanced in the intestate's lifetime take their share they must bring the amount advanced into hotchpot (see *Boyd v. Boyd*, L. Rep. 4 Eq. Cas. 305); but this does not apply to realty given to the heir. A child advanced in part brings in the amount thereof only among the other children; and no benefit will accrue from it to the widow, who takes simply her third; the son here takes 6166*l.* 13*s.* 4*d.*, and the daughter the residue, 7166*l.* 13*s.* 4*d.*: (2 St. O. 209, 8th edit.)

**Q.**—If an intestate dies, leaving a deceased brother's daughter and two grandchildren of a deceased sister, how would the surplus be divided?

**A.**—The whole will go to the deceased brother's daughter for the reason above stated: (see 22 & 23 Car. 2, c. 10, s. 7; Alln. *sup.*; Coote, *sup.*)

**Q.**—If a person dies intestate, without leaving father, wife, or child, but leaving a mother, a brother, and two children of a deceased brother, how would the surplus of the intestate's estate be distributed?

**A.**—A third to the mother, another third to the brother, and the remaining third to the two children of the deceased brother: (see 1 Jas. c. 17, s. 7; Coote, *sup.*)

**Q.**—If a widower dies intestate, and without issue, leaving a mother, mother-in-law, sister, sister-in-law, two nephews, sons of a deceased brother, and a posthumous brother of the half blood, him surviving, who will be entitled to his personal estate as his next of kin, and in what proportions?

**A.**—The personal estate will be distributable in four equal shares, the mother taking one share, the sister another, the two nephews another, they representing their father, and the posthumous brother takes the remaining fourth share: (22 & 23 Car. 2, c. 10; 29 Car. 2, c. 3; Matt. Exors. 296, 2nd edit.; Coote's Prob. Pr. 78, 89, 6th edit.)

**Q.**—A. dies intestate, and without issue, leaving the following relatives: A son of his wife by a former marriage; a sister of the half-blood; a son of a deceased brother of the half-blood; a granddaughter of a deceased brother of the whole blood; and a son of a deceased sister of the whole blood. Who is A.'s heir-at-law?

**A.**—The granddaughter of the deceased brother of the whole blood is A.'s heir-at-law.

**Q.**—Under the circumstances stated in the last question, who would take as A.'s next of kin under the Statute for Distribution of Intestates' Effects, and in what shares?

**A.**—The sister of the half-blood, the son of the deceased brother of the half-blood, and the son of a deceased sister of the whole blood, will

take one-third each of the personal estate, as the half-blood take with the whole blood, and there is no representation beyond nephews and nieces.

*Q.*—Explain and give an illustration of the meaning of “hotchpot.”

*A.*—Hotchpot is a blending or mixing of lands and chattels answering in some respects to the “*collatio bonorum*” of the civil law. As to lands it only applied to such as were given in frank-marriage, which gifts have now fallen into disuse, but as to personalty in case of intestacy the Statutes of Distribution provide that where some of the children have previously received a portion or advancement such children are allowed only so much more out of the intestate’s personal estate as will suffice to make their share equal to that of the other children: (Wharton’s Law Lex. 6th edit. 450; 1 St. C. 8th edit. 346.)

*Q.*—An English subject of full age dies intestate, leaving a widow, two sons, and two daughters. He died possessed of land in Kent (not disgavelled), of freehold and leasehold houses not in Kent, and of money in the funds. Among whom, in what proportions, and for what interests, would his property be divided, there having been no settlement on his marriage?

*A.*—The land in Kent descends to his two sons in fee equally, subject to the widow’s freebench. The eldest son takes the freehold houses in fee, subject to the widow’s dower. The leasehold houses and money in the funds, after payment of the debts, will be divided by the administrator, one-third to the widow, and one-sixth to each of the children.

*Q.*—If A. dies intestate, leaving a mother, wife, two sons, and three daughters, him surviving, how will his property be divided, consisting of (a) freehold farm in Kent; (b) freeholds intermixed with leaseholds in Sussex; (c) freehold farm in Surrey, contracted to be sold; (d) railway bonds; (e) Government stock; (f) New River share?

*A.*—(a) If not disgavelled, to the two sons, subject to the two widows’ freebench, if any. (b) The freeholds to eldest son, subject to widow’s dower, &c.; the leaseholds, being personalty, will go—a third to wife, rest to sons and daughters equally. (c) This, being an equitable conversion, will go as the leaseholds. (d and e) Like the leaseholds. (f) To the eldest son, being real estate, subject to dower, if any.

*Q.*—A freeman of the city of London dies intestate, leaving a wife, two sons, and three children of a deceased son. How is the personal estate divided, and how would it be divided under similar circumstances if the person dying were not a freeman of London?

*A.*—The city of London, the province of York, and the principality of Wales, had peculiar customs for the distribution of intestates’ effects, expressly excepted out of the Statutes of Distribution: (Matt. Exors. 301, 2nd edit.) But these customs are now abolished (see 19 & 20 Vict. c. 94), so that whether the intestate be a freeman of the city of London or not, and dies intestate, as in the case put, a third will go to the wife, and the rest be divided amongst the two sons, and the children of the deceased son; the children, however, only taking their deceased parent’s share: (22 & 23 Car. 2, c. 10; 19 & 20 Vict. c. 94.)

Q.—By marriage settlement the husband covenants to leave by his will to the wife 10,000*l.* He dies intestate, possessed of personal property of the value of 40,000*l.*, and leaving his wife and one child and one grandchild surviving. How, in the administration of the estate, should the 40,000*l.* be divided.

A.—Assuming the grandchild to be the child of a deceased child, the widow, child, and grandchild will each take one-third of the 40,000*l.* The widow will not take the 10,000*l.* under the covenant, and her distributive share of the residue, the rule being that in case of such a covenant, the distributive share in case of an intestacy is to be considered as a performance if equal to or greater than the sum covenanted to be paid; if less, as a part performance: (Sm. Man. sect. 52.)

Q.—How is the disposition of the personal estate of an intestate Englishman domiciled in France regulated?

A.—By the French law. But according to the French law mere residence does not give a domicile in France: (see *Bremer v. Freeman*, 28 L. T. Rep. 37.)

Q.—What is the order in which next of kin are entitled to letters of administration?

A.—The intestate himself is the *terminus a quo* the several degrees are numbered. Therefore, in the first place, the children and their descendants, or, on failure of children, the parents of the deceased, are entitled to the administration; both parents and children are in the first degree, but the children are allowed the preference. Then follow brothers, grandfathers, uncles, or nephews, and the females of each class respectively; and lastly, cousins. The half-blood is admitted to the administration, as well as the whole: (Alln. Wills & Adms. 174, 3rd edit.; Coote's Prob. Pr. 85 *et seq.*, 6th edit.)

Q.—State when the next of kin take *per stirpes*, and when *per capita*.

A.—If the next of kin take by representation, they are said to take *per stirpes*; if in their own right *per capita*: (Alln. Wills & Adms, 357, 3rd edit.)

Q.—Is there any, and if any what, difference between the distributive share of an intestate's effects taken by brothers and sisters of the half-blood and whole blood?

A.—A brother or sister of the half-blood is equally entitled with one of the whole blood: (Alln. Wills & Adms. 374, 3rd edit.)

Q.—In case of intestacy as to real estate, to whom will it descend?

A.—To the intestate's heir-at-law: (Will. R. P. 101, 13th edit.)

Q.—What do you understand by the legal maxim, *Nemo est hæres viventis*?

A.—That the ancestor cannot have an heir during his life; the heir being appointed by law. Therefore during this time the heir is either apparent or presumptive only: (Will. *supra*.)

Q.—What is the difference between an heir apparent and an heir presumptive?

A.—An heir apparent is the person who, if he survives the ancestor, must certainly be his heir, as the eldest son in the lifetime of his father.

An heir presumptive is the person who, though not certain to be heir, at all events, should he survive, would yet be the heir in case of the ancestor's immediate decease. Thus, an only daughter is the heiress presumptive of her father, but whose present hopes may be hereafter cut off by the birth of a son : (Will. R. P. 97, 13th edit.)

Q.—State the law of primogeniture.

A.—Primogeniture is the right of the eldest son to inherit his ancestor's real estate, to the exclusion of the younger son : (Holth. L. D., 2nd edit.)

Q.—Explain the doctrine of "*possessio fratris*."

A.—*Possessio fratris* is the seisin of the brother. Under this doctrine a sister of the person who took by descent from his father, and who entered on the lands, was preferred to a brother of the half-blood; the maxim being *Possessio fratris facit sororem esse hæredem*. Now, however, by the 3 & 4 Will. 4, c. 106, the purchaser is the root of descent, and seisin is unimportant : (1 St. C. 418, 8th edit.) (a)

Q.—"*Seisina facit stipitem*." What is the meaning of the sentence ? And is it true as the law now stands ? And if not, how has the law been altered ?

A.—The meaning of the maxim is, that "seisin is the root of descent." It is not true as the law now stands, for by the Inheritance Act, 3 & 4 Will. 4, c. 106, it is provided that descent shall now be traced from the last purchaser, *i.e.*, the person last entitled not by descent, instead of the person last seised : (see Wms. R. P. 102, 13th edit.)

Q.—Can persons of the half-blood inherit real estates by descent in any and what cases, and under what authority ?

A.—A kinsman of the half-blood is now capable of being heir, and such kinsman is to inherit next after a kinsman in the same degree of the whole blood and his issue when the common ancestor is a male, and next after the common ancestor when such ancestor is a female : (3 & 4 Will. 4, c. 106, s. 9 ; Will. R. P. 110, 13th edit.)

Q.—Compare the rules for the descent of an estate in fee simple with the rules for the division of the personal estate of an intestate, as regards the treatment of the half-blood.

A.—In the case of personalty the half-blood take equally with the whole ; blood as to realty, see last answer.

Q.—What are the general rules as to the descent of freehold lands of inheritance ?

A.—As altered by the 3 & 4 Will. 4, c. 106, the rules of descent may be thus stated :

1. In every case the descent shall be traced from the purchaser.
2. Inheritance shall in the first place lineally descend to the issue of the purchaser *in infinitum*.
3. Males are preferred to females, and an elder male to a younger ; but females (when there are several) take together.

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(a) But even now, if the brother be the purchaser, the sister of the whole blood is preferred to the brother of the half-blood : (Will. R. P. 110, 13th edit.)

4. The issue of the children of the purchaser represent or take the place of the parent *in infinitum*; the children of the same parent being always subject (amongst each other) to the same law of inheritance as contained in the third rule.

5. On failure of the issue of the purchaser, the inheritance shall descend to the nearest lineal ancestor then living in the preferable line, supposing no issue of a nearer ancestor in that line to exist.

6. Among the lineal ancestors of the purchaser, the paternal line (whether of the purchaser or of any ancestor, male or female) is always preferred to the maternal.

7. Where an ancestor, to whom, if living at the purchaser's death, the inheritance would, according to the fifth rule, have descended, dies before the purchaser, leaving issue, the issue of such ancestor *in infinitum* shall represent him, according to the same law of succession as before laid down with respect to the issue of the purchaser; but with this addition that those related by the whole blood to the purchaser are preferred to those related by the half-blood: (1 St. C. ch. xi.)

8. In the admission of female paternal ancestors, the mother of the more remote male paternal ancestor and her heirs is preferred to the mother of a less remote male paternal ancestor and her heirs, and the same on the maternal side.

9. Where there is a total failure of heirs of the purchaser, &c., the descent shall be traced from the person last entitled to the land as if he had been the purchaser: (22 & 23 Vict. c. 35, ss. 19, 20.)

Q.—What are the chief alterations in the law of descent effected by the 3 & 4 Will. 4, c. 106?

A.—They are the following: (1) Descent is now traced from the purchaser, *i.e.*, the last person who had a right to the lands, not having taken them by descent. Formerly, it was from the person last seised. (2) On the failure of the issue of the purchaser the inheritance descends to the nearest lineal ancestor then living, if no issue of a nearer ancestor in that line exists. Before this Act it was a rule that the land should rather escheat than ascend to an ancestor. (3) Kinsman of the half-blood can now inherit. This is an alteration in the law of inheritance, for as the law formerly stood, the half-blood, like the lineal ancestor, was wholly excluded, and the lands escheated rather than he should take: (see Will. R. P. pt. I., ch. 4.)

Q.—What is the meaning of “descent being traced from the last purchaser?” Is a devisee of real property a “purchaser?”

A.—The meaning is that on the death of the owner of real estate intestate descent is to be traced from the person last entitled not by descent: (see 3 & 4 Will. 4, c. 106.) A devisee of real estate is a purchaser.

Q.—A. buys an estate and devises it to B., who survives A. and dies without issue and intestate; from whom is the descent to be traced, and why?

A.—The descent must be traced from B., as he is the purchaser, being the person last entitled to the land who did not take by descent: (see 3 & 4 Will. 4, c. 106, s. 2; Brow. R. P. Stats. 167.)

Q.—A testator had one son by his first wife, and two by his second.



He devised a freehold estate to his second son, who survived his father, and died intestate and unmarried, leaving his two brothers, one being older than himself and one younger, him surviving; to whom would the estate go? And give the reason for your answer.

A.—As the second son is the purchaser, i.e., the last person entitled to the estate otherwise than by descent, the estate goes to his younger brother of the whole blood in preference to the elder of the half-blood, the rule being that those related by the half-blood take only after those related by the whole blood and their descendants where the common ancestor is a male: (1 St. C. ch. xi. ; 3 & 4 Will. 4, c. 106.)

Q.—A purchaser of land dies intestate, leaving an only son, and no other relations. The son dies unmarried and intestate, having relations on the part of his mother. How does the land descend, and from whom is the descent traced as purchaser? And give the reasons for your answer.

A.—On failure of heirs of the purchaser, the inheritance shall descend to the heirs of the last person entitled: (22 & 23 Vict. c. 35, s. 19.) It therefore descends to the next heir of the son on the mother's side, there being none on the father's side.

Q.—A man having had two sons, the elder of whom died before him leaving two sons, dies intestate, seised in fee of gavelkind lands, leaving issue the two grandsons (sons of his eldest son) and his second son. State the proper parties to convey to a purchaser.

A.—Both the son and grandsons must join in the conveyance. For by the custom of gavelkind the lands descend, not to the eldest son or his issue, but to all his sons together; and if any of the sons be dead, his representatives stand in his stead: (Rob. Gav. by Norwood, 56.)

Q.—B., seised of land held under the custom of gavelkind, died intestate, without ever having been married. He left behind him two brothers and one nephew, the son of a deceased brother. Who took the gavelkind land?

A.—The custom of descent to all the males in gavelkind extends to collaterals. The two brothers and nephew, therefore, take the land equally as coparceners.

Q.—A. dies, leaving two granddaughters, the issue of a deceased daughter; a grandson, the issue of another deceased daughter, and two daughters; to whom will his estate in fee simple descend?

A.—The estate will descend to the whole of them as coparceners, and the two granddaughters and the grandson will respectively stand in the place of and take their deceased parents' share: (Sug. R. P. Stats. 282, 283; *Cooper v. France*, 14 Jur. 214.)

Q.—A. dies, without issue, leaving a father, and brother of the half-blood, and a sister of the whole blood; upon whom would the estate have descended previous to the operation of the Inheritance Act (3 & 4 Will. 4, c. 106), and upon whom would it descend subsequently to that period?

A.—Prior to the above statute the estate would in such a case have descended to the sister of the whole blood in preference, not only to the

brother of the half-blood, but also to the father. By this Act, however, the father is capable of being heir to his son, and in the case put will inherit in preference to the sister of the whole blood or brother of the half-blood: (1 St. C. 419, &c., 8th edit.; Will. R. P. 110, 13th edit.)

Q.—Explain the nature of the title by escheat, and when it occurs.

A.—Escheat is the resulting back to the lord of the fee, of lands of which a tenant dies seised in fee simple, intestate, and without heirs. In order to complete his title, the lord must enter on the land escheated. Escheats are frequently divided into those *propter defectum sanguinis*, and those *propter delictum tenentis*, the former occurring when the tenant dies without heirs, the latter when his blood is attainted: (see 1 St. C. 482, 8th edit.; Will. R. P. 126, 13th edit.)

Q.—If a person who is illegitimate dies intestate, leaving no legitimate issue, who becomes entitled to any freehold or copyhold or personal estate of which he may die possessed?

A.—Bastards, being *nullius filii*, cannot be heirs themselves, nor have any heirs but those of their own bodies. Therefore, the freeholds in fee, if he dies intestate, escheat to the lord of the fee, usually the Crown, and the copyholds to the lord of the manor: (1 St. *sup.*; Will. *sup.*)

The personal estate will, for the like reasons, be *forfeited* to the Crown; and letters patent are procured from the Queen, and administration is granted to the appointee of the Crown: (Coote's Prob. Pr. 96, 98, 6th edit.)

Q.—A man seised in fee dies intestate, and without issue, leaving a widow, a father, and an elder brother: who becomes entitled to his estate, and by what law?

A.—The father will become entitled to the estate (subject to the widow's right to dower, if not barred) by the statute 3 & 4 Will. 4, c. 106, s. 6: (see 1 St. C. 406, 8th edit.; Will. R. P. 106, 13th edit.)

Q.—A. dies intestate, leaving a wife, two sons, and a daughter; what becomes of his property, which consists of freeholds, copyholds, leaseholds for lives and years, and consols.

A.—The freeholds descend to the eldest son, subject to the wife's dower, if any.

The copyholds would go in the same way, unless there was a special custom of descent in the manor.

The leaseholds for life would be assets in the hands of the administrator, unless the original grant were made to A. and his heirs, in which case his heir would take as special occupant.

The leaseholds for years and consols would be distributed by the administrator, one-third to the wife and the remainder equally between the two sons and daughter: (see 3 & 4 Will. 4, c. 106, and Stat. of Distribution, 22 & 23 Car. 2, c. 19.)

Q.—A. dies intestate, seised in fee simple, leaving one daughter (B.), a grandson by a deceased daughter (C.), a grandson and granddaughter by a deceased daughter (D.), a granddaughter by a deceased son (E.), and two granddaughters by a deceased daughter (F.); to whom will A.'s real estate descend?

A.—The granddaughter by the deceased son (E.) will be entitled to the real estate of A.; the rule being that the male issue and their descendants shall be admitted before the female: (Will. R. P. 103, 13th edit.; 1 St. C. 399, 8th edit.)

Q.—B. buys 1000 acres of land, which are conveyed to him in fee simple. He dies intestate, leaving a grandson (issue of a deceased daughter), a great-granddaughter (issue of a deceased son), and two daughters. Who will be entitled by descent to B.'s land? Give an authority for your answer.

A.—The great-granddaughter, issue of the deceased's son, will be entitled to the land, as by the fourth canon of descent the lineal decendants *in infinitum* of any person deceased shall represent their ancestor, that is, shall stand in the same place as the person himself would have done had he been living: (see Will. R. P. 105, 13th edit.)

Q.—A. dies seised of real estate without issue, and intestate, leaving his grandfather, and his (A.'s) mother, and a brother and sister him surviving; which of these is his heir?

A.—His brother is his heir: (see Will. R. P. 106, 13th edit.; 1 St. C. 406, 8th edit.)

Q.—A man dies intestate, leaving a wife, a daughter of an aunt on his mother's side, and the son of an aunt on his father's side, his only relations; to whom would his real estate descend? Give the reason for your answer.

A.—The real estate will, subject to the widow's dower if not barred, descend to the son of the aunt on the father's side, by virtue of the 3 & 4 Will. 4, c. 106, s. 7, which enacts that the paternal ancestors of the purchaser and their descendants shall take before the maternal ancestors or their descendants: (Will. R. P. 108, 13th edit.; 1 St. C. 409, 8th edit.)

Q.—If a man dies intestate, leaving a wife, mother-in-law, step-mother, a sister, a niece daughter of a deceased brother, two nephews sons of a deceased sister, and no other relations him surviving; who will be entitled to his real and personal estate, and in what proportions?

A.—The daughter of the deceased brother will take the real estate, subject to the widow's dower if not barred: (3 & 4 Will. 4, c. 106, s. 7; Will. R. P. 108, 13th edit.; 1 St. C. 409, 8th edit.) The widow will take half of the personal estate, and the other half will be divided into three equal shares, one to the sister, another to the niece, and the remaining third to the two nephews: (Matt. Exors. 298, 2nd edit.)

Q.—A man having purchased real estate, and being possessed of personal property, dies intestate; he has no child, and his father and mother are dead, but he leaves a widow, a sister by the whole, and two brothers by the half-blood. How will his real and personal property respectively devolve? and how would it have been if, instead of having purchased his real estate, he had inherited it from his father who bought it?

A.—The sister of the whole blood of the purchaser takes the real estate subject to the widow's dower if not barred; but had he inherited it from his father, and the latter been the common ancestor, the eldest of the brothers would take it subject as aforesaid.

The personal estate goes one half to the widow and the other half equally between the sister and two brothers.

*Q.*—A. and B. (each being an only child) became separately possessed of land in fee simple: A. as heir-at-law of his mother, and B. under his mother's will. A. and B. both died intestate, each leaving a brother of his father and a brother of his mother surviving him. To whom will the lands of A. and B. respectively go?

*A.*—The lands of A. will go to the brother of his mother; for here A. took the lands *ex parte maternâ*, and consequently relations on the father's side cannot inherit, except on failure of the mother's heirs under 22 & 23 Vict. c. 35, the descent never having been broken. The lands of B. will, however, go to the brother of the father, for the will of the mother broke the line of descent and made B. the purchaser and root of descent, and the 3 & 4 Will. 4, c. 106, s. 7, enacts that the paternal line of the ancestors is preferred to the maternal: (1 St. C. 409, 427, 428, 8th edit.)

*Q.*—A. seised *ex parte maternâ*, makes a conveyance to the use of himself and his heirs; what is the effect of this upon his estate?

*A.*—The effect of this upon his estate is to break the descent and make himself the purchaser, from whom the descent will in future be traced, and thus let in, on failure of issue, the heirs *ex parte paternâ*, in preference to those *ex parte maternâ*; who, if A. had died before this conveyance, would have inherited in total exclusion of the heirs *ex parte paternâ*: (1 St. C. 427, 428, 8th edit.)

*Q.*—If a man dies intestate, possessed, after payment of his debts, funeral and testamentary expenses, of—1, railway bonds; 2, railway shares; 3, a king's share in the New River Company; 4, leaseholds for lives; 5, leaseholds for years; 6, a policy of 5000*l.* on the life of another person; 7, copyholds of inheritance; and 8, a freehold house—leaving a widow and five sons and five daughters him surviving; upon whom will each of these several descriptions of property devolve, and in what proportions?

*A.*—The railway bonds, the railway shares, unless the latter are made realty by the Act or charter of incorporation (see *Edwards v. Hall*, 25 L. J. 82, Ch.), the leaseholds for years, and the policy of assurance are personal property, and will devolve upon the widow and ten children, the widow taking a third, and the children the remainder equally: (see *Matt. Exors.* ch. 1, 2nd edit.)

As to the leaseholds for lives, if they were granted to the intestate and his heirs, they will go to the eldest son as special occupant; but if the heir was not mentioned, they devolve upon the widow and children in the proportions above stated: (see *Will. R. P.* 20, 13th edit.)

As to the freehold house, we presume it is a freehold of inheritance, and will therefore, along with the share in the New River Company and the copyholds, pass to the eldest son as heir-at-law, subject, however, to the widow's right to dower if not barred: (see *Matt. Exors.* 3, 2nd edit.)

*Q.*—Suppose a son of a second marriage has purchased real estate in fee simple, and dies intestate, without issue, but leaves surviving him a brother by the first marriage, and two sisters by the second marriage, to whom will this real estate descend, and for what reason?

A.—It will descend to his two sisters as coparceners, as, although the half-blood by 3 & 4 Will. 4, c. 106, may now inherit, yet it is not until after persons in the same degree of the whole blood and their descendants, and brothers and sisters are in the same degree.

Q.—If A. claims to be heir-at-law, as eldest son of B., what evidence is necessary to prove the heirship?

A.—Evidence of the marriage of B., of the baptism or birth, and time or order of birth of A., and of the death or burial of B. The parochial register would be evidence both of the time and fact of the marriage of B., and of his burial. The parochial register of baptisms would be evidence of the birth of A., but not of the time or order of birth, as to which a certified extract from the general register established under 6 & 7 Will. 4, c. 86, and 1 Vict. c. 22, might be obtained. This evidence must be supported by statutory declarations, &c. : (see Dart's V. & P. 196-200, 2nd edit.)

### TRUSTEES, EXECUTORS.

Question.—Can a trustee for sale become a purchaser in any, and what case?

Answer.—A trustee cannot purchase of himself, and he is not allowed to become a purchaser of the trust property even at a sale by public auction. But although a trustee cannot purchase of himself, he is allowed to purchase from his former *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a scrupulous and jealous examination of all the circumstances, and there is no fraud, no concealment, and no advantage taken by the trustee of information acquired by him in the character of trustee : (St. Eq. §§ 321, 322 ; *Fox v. Mackreth*, 1 L. O. Eq. 92, 2nd edit., is the leading case on the point.) (a)

Q.—When an estate is offered to a trustee at a price below its actual value, upon condition that the title should not be investigated, is the trustee justified, under the usual indemnity clause inserted in settlements, in purchasing the estate out of the trust funds, at the request of his *cestui que trust*, upon those terms? And give a reason for your answer.

A.—No ; for if a trustee invests money on unauthorised security, however unexceptionable it might seem to be, and such security afterwards fails, he will be liable ; and an indemnity clause, declaring that he shall not be liable for the insufficiency, will not exonerate him from liability. A trustee who commits a breach of trust is not protected, although it was done at the request of his *cestui que trust* : (Sm. Man., sect. 350 ; and see hereon 22 & 23 Vict. c. 35, ss. 30-32.)

Q.—What powers should be given to the trustees of a will of real estate directing sales, and declaring trusts of the proceeds, that may last for many years?

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(a) Also asked thus : What is the leading case relating to purchases by trustees for sale from a *cestui que trust*? State the rule thereby established.

**A.**—Power for trustees to sell by public auction or private contract, and either in lots, or entirely, with power to buy in and rescind any contract for sale, and to resell; to lease; to give receipts; and appoint new trustees. Also power to invest and vary the investments, if necessary, to make advancements, and the like: (see *Alln. Will.* 44 *et seq.*, 3rd edit.) But it must be borne in mind that the majority of these powers are now incident to trusts for sale: (see 22 & 23 Vict. c. 35; and 23 & 24 Vict. c. 145; and as to instruments coming into operation after the 31st December, 1881, see 44 & 45 Vict. c. 41, s. 35.)

**Q.**—Where trustees are authorised to invest money on real security, and the will contains a clause that they shall not be liable for the insufficiency of securities, are they bound to take any, and what, precautions before lending on mortgage, and will they in any, and what, case be responsible for taking a mortgage which proves deficient?

**A.**—Trustees are bound to take all usual precautions, such as obtaining a proper valuation, &c. The clause in question only protects them from any defect against which their precautions have not succeeded in guarding them: (see *Stretton v. Ashmall*, 3 Dr. 10: *Stewart v. Sanderson*, 10 Eq. 26.)

**Q.**—Securities passing by delivery are settled. Will the trustees be held irresponsible if such securities be made away with by one of their number? What course would you recommend to insure their safety?

**A.**—All the trustees are responsible for a breach of trust committed or in any way arising in consequence of their own proceeding or negligence, but not for one arising through an act of dishonesty on the part of one of them committed without the knowledge of the others, or any negligence on their part. The securities had better be deposited at a banker's in a box, with separate locks, each trustee having a key, so that access can only be obtained to them by the consent of all, as suggested in *Cotton v. Eastern Counties Railway Company* (1 J. & H. 243.)

**Q.**—Does or not the proviso for indemnity and reimbursement of trustees in the law of property Act, 1859, dispense in practice with an express clause? Give any explanations.

**A.**—A high authority (Lewin on Trusts) states that, since this Act, the express introduction of this proviso in deeds and wills may be safely dispensed with: (see p. 211, 4th edit.) And he further states that the express proviso adds nothing to the trustee's security against the liabilities of his office, and that equity always infused such a proviso into every trust deed: (*Ib.*)

**Q.**—Did or did not the provisions of the Trustee Act, 1860, making the receipts of a trustee for money payable to him in the exercise of any trust or power a discharge from liability to see to the application, in practice supersede the necessity or expediency of any express clause? giving reasons or remarks.

**A.**—The 29th section of this Act did away with the necessity of inserting an express clause empowering trustees to give receipts, unless the operation of the Act were negatived, for it was not confined to "purchase or mortgage moneys" payable to trustees, as in the Act of Lord St. Leonards of 1859, sect. 23: (see Langley's Notes to these Acts.) But it



was still advisable to insert a receipt clause, as this was far more easily found than the absence of the clause negating the Act or of the power to give receipts; but these are now unnecessary after the 31st December, 1881: (44 & 45 Vict. 41, s. 36.)

**Q.**—A. devises real estate to M. and N. in trust for sale, and appoints X. and Y. his executors. Can the trustees make a good title without the concurrence of the executors?

**A.**—They can, and even if the real estate is charged with debts, the concurrence of the executors is now unnecessary in such a case.

**Q.**—What is the leading case as to the liability of a purchaser to see to the application of the purchase money? And state the principle there laid down, and further whether it applies to a sale of leaseholds, with your reason for your reply to the latter part of the question.

**A.**—It is presumed that the question applies to the case of a purchaser from a trustee, and if so, *Elliott v. Merriman* (Barnardiston, 78) is generally considered the leading case. Until the recent Acts of Parliament a purchaser from a trustee was bound to see to the application of the purchase money unless it was declared by the trust deed, either expressly or impliedly (as by a charge of debts, a power to vary securities, or the like), that the trustee's receipt was to be a good discharge. The rule was exactly the same with regard to leaseholds unless the purchase was made, not from a mere trustee, but from an executor or administrator, who, being the person to administer the personal estate and pay the debts, has always a power to give receipts.

**Q.**—What powers of investment are given to trustees by statute? Are land mortgage debentures authorised by statute as an investment for trustees, and if so, with what limitations, if any?

**A.**—Unless forbidden by the trust instrument trustees may invest upon real security in any part of the United Kingdom, English, or Irish Bank Stock, East India Stock, Exchequer Bills, Consols, Reduced and New Three per Cent. Annuities, and Two and a Half per Cent. Annuities: (22 & 23 Vict. c. 35, s. 32; 23 & 24 Vict. c. 38, s. 12. Order 1st February, 1861.)

Also upon the stocks of any Government the interest of which is guaranteed by this Government; also Metropolitan Board of Works Stock; also where they have power to invest in Railway Debentures, they may invest in Debenture Stock.

By 28 & 29 Vict. c. 78, s. 40, where trustees have power to invest in shares, &c., of companies incorporated by Act of Parliament, they may invest in mortgage debentures duly issued under and in accordance with the provision of that Act.

**Q.**—If a trustee of a term dies leaving an executor, who dies and leaves an executor, who is the representative of the trustee; and who if the executor dies intestate?

**A.**—In the first case the executor of the trustee's executor will be the trustee's representative; in the second, a representative must be appointed by taking out administration *de bonis non* to the goods of the trustee: see *Matt. Exors.* 306, 2nd edit.)

**Q.**—Can a trustee give a power of attorney to another person to act for him in the trust? And give a reason for your answer.

**A.**—In most matters connected with the trust he cannot do so, for in him is reposed a *personal trust and confidence* to exercise his own judgment and discretion; and when such is the case the maxim *Delegatus non potest delegare* applies: (1 Sug. Pow. 221, 6th edit; see also *Viney v. Chaplin*, 31 L. T. Rep. N. S. 142.)

**Q.**—If lands are devised to a trustee, his heirs and assigns, upon trust that he or they sell the same, and no power of appointing a new trustee is given by the will, and the trustee by deed conveys the land to A. in order that he may execute the trust, can A., as assignee of the trustee, do so? And if, instead of making the conveyance to A., the trustee has died devising the trust estate to A., could A. then have executed the trust?

**A.**—Under the conveyance A. cannot, as assignee, execute the trusts of the will. Under the devise, however, it was held that he might do so: (*Hall v. May*, 30 L. T. Rep. N. S.). In case of death after 1881, the trust estate now devolves on the personal representative: (44 & 45 Vict. c. 41, s. 30.)

**Q.**—A. mortgages an estate in fee simple to B. and C. trustees. The deed is in the usual form, with a covenant for payment. C. survives B., and dies intestate, leaving a widow and only child, a married woman. You have to appoint new trustees and get the mortgage transferred. Who would you make parties to your transfer, and what would be the character of the deed?

**A.**—The widow or other administrator of the deceased surviving trustee must convey the estate and assign the debt to the new trustees after their appointment, which (if they cannot be appointed under the settlement, or sect. 31 of 44 & 45 Vict. c. 41) must be done by order of the Court of Chancery obtained on petition. It is presumed that the original mortgage did not disclose the trust, but stated that the mortgagees advanced the money on a joint account; the transfer should merely state that the debt now belonged to the new trustees, not disclosing the trust.

**Q.**—A purchases a freehold estate, B. and C., his wife's trustees, lending part of the money. It is desired to embrace in one deed the mortgage and conveyance. State shortly how the estate should be limited.

**A.**—The estate should be limited unto and to the use of B. and C. (the trustees), their heirs and assigns, by the direction of A.; with a proviso for redemption by A., and conveyance to him by B. and C. on payment of the sum lent, with interest in the meantime.

**Q.**—What covenants is it usual for trustees to enter into?

**A.**—Trustees having no interest in the property conveyed, merely covenant that they have done no act to incumber: (Will. R. P. 449, 13th edit.; Sug. Conc. V. 463.) This covenant is now implied: see sect. 7 (F), 44 & 45 Vict. c. 41.

**Q.**—Can one of several executors, or one of several administrators, assign leaseholds of his respective testator or intestate, or must they all concur? State any distinction, if it exists, and the reasons for it.

**A.**—An assignment of leaseholds by one of several executors who prove

the will is good, they having a joint and several interest in their testator's personal estate. As to administrators, it was formerly held they must all join (*Jacomb v. Harewood*, 2 Ves. 265; Burt. Comp. 958), but it is now decided that an assignment by one of several administrators is good: (*Sneesby v. Thorne*, 1 Jur. N. S. 536.)

Q.—Give the heads of a deed of assignment for carrying out the sale of leasehold property by the executor of the lessee.

A.—Date, parties, recitals of indenture of lease, of will of lessee appointing vendor executor, death of testator and probate of his will. Agreement for sale, witnessing part, vendor as executor assigns premises comprised in lease to purchaser for remainder of term (covenant by vendor against incumbrances is now implied), covenant by purchaser to pay rent and observe covenants in lease and to indemnify the executor therefrom: (Prid., 9th edit. 1240.)

Q.—State very shortly the ordinary successive steps in the administration, without suit, by an executor of the effects of a solvent testator.

A.—1. The executor must bury the deceased in a manner suitable to the estate he leaves behind him.

2. He must prove the will of the deceased.

3. He must make an inventory of all goods and chattels: (21 Hen. 8, c. 5.)

4. He is to collect all the goods and chattels so inventoried, and to that end is to bring actions, if necessary, against persons who withhold them.

5. He must pay the debts of the deceased;

6. And then the legacies (after paying the duty).

7. He must pass a residuary account, pay the duty, and account for the balance to the residuary legatee, if one is appointed by the will, and if none, he must divide the same amongst the next of kin: (2 St. C., 8th edit. 199.)

Q.—What change has lately been made in the law with reference to an assignment by the owner of a chattel real to himself jointly with others or another, and how and when was such change made?

A.—The 22 & 23 Vict. c. 35 (passed 13th Aug. 1859), enacts that any person shall have power to assign personal property, including chattels real, directly to himself and another person, or persons, or corporation, by the like means as he might assign the same to another: (sect. 21.) Before this Act this could not have been done, but such property must have been assigned to a third party, who re-assigned it to the two (or more) jointly.

Q.—Why and till when on the appointment of new trustees were two deeds necessary for transferring the personal estate from the continuing trustees to the new body of trustees? Why was one deed sufficient in the case of freeholds?

A.—In consequence of the rule of law that a man cannot convey to himself, two deeds were necessary for transferring the personal estate till 13th of August, 1859, when Lord St. Leonards' Act (22 & 23 Vict. c. 35) came into operation, which provided that personal property might be assigned by a person directly to himself and another. Before the Act this

could not be done, the Statute of Uses not applying to personal estate. One deed was sufficient in case of real property, as the continuing trustee could convey such property to a third person, or to the new trustee to the use of himself and the new trustee, and then by virtue of the Statute of Uses they had the legal estate jointly.

*Q.*—What is an executor *de son tort*; and in what cases is a discharge given by him available against a claim brought by the legal representative?

*A.*—An executor *de son tort* is one of his own wrong: (see *ante*, p. 55.) But his lawful acts are good; as where he receives assets and gives a discharge, and before action brought hands them over to the rightful executor: (Wm. Exors. 194, 197, 3rd edit.; and see *Hill v. Curtis*, L. Rep. 1 Eq. 90.)

*Q.*—In the absence of any express direction how may an executor deal with a legacy given to a minor so as to be free from responsibility?

*A.*—He may do so by first deducting the legacy duty, and then paying the legacy into the Bank of England with the privity of the Paymaster-General, to be placed to the account of the infant: (36 Geo. 3, c. 52, s. 32; 37 Geo. 3, c. 135; 35 & 36 Vict. c. 44.)

*Q.*—In case of a charge by will coming into operation since the Law of Property Act, 1859, of debts and legacies, who is clothed with power to raise money necessary for the purpose, and by what means?

*A.*—If the whole estate or interest in the property charged be devised, the devisees in trust or the survivor may, notwithstanding the want of an express power, raise the money by sale or mortgage. But if the whole estate is not devised then the executors have the same power: (sects. 14, 16.)

*Q.*—What was the position, legal and equitable, of an executor in respect of residue undisposed of by the will previously to the statute 11 Geo. 4 & 1 Will. 4, c. 40; and what alteration did the statute make?

*A.*—Before this statute the executor was at law entitled to such residue; and in equity also, unless it appeared to have been the testator's intention to exclude him from it. But equity seized hold of any slight expressions of the testator to constitute the executor a trustee for the next of kin. By the above Act the executors are in equity trustees for the next of kin (if any), unless the will shows a contrary intention: (St. Eq. § 1208, and note.)

*Q.*—If A. dies, leaving B., C., and D. his executors, and B. only proves his will and dies, leaving C. and D. him surviving, who will be the legal personal representative of A.?

*A.*—If power were reserved by the court to grant probate to C. and D., they (or either of them) are the proper parties to prove the will of A. and become his legal personal representative. If, however, they renounced probate, they cannot retract such renunciation as formerly; and are treated as not named in the will, and B.'s executor represents A.'s estate, but if B. died intestate administration *de bonis non* must be taken out by some person, who will thereby become the legal personal representative of A.: (see Coote's Prob. Prac. 39, 47, 49, 192, &c., 6th edit.)

Q.—If the will of A. is proved by his two executors B. and C., and then B. dies intestate, and then C. dies testate, but without naming executors, who will be the legal personal representative of A. ?

A.—A representative must be constituted by taking out administration *de bonis non*: (Matt. Exors. 306, 2nd edit. ; Dodd & Brook, Pro. Pr. 432.)

Q.—If real estate be devised to a trustee who is unwilling to act, and who has not acted, what is the usual and proper course to be taken by him ?

A.—To execute a deed of disclaimer. However, a deed was not essential, except in the case of a married woman, but it affords more satisfactory evidence: (Hayes & Jarm. Conc. Wills, 453, 454, 6th edit.) If the trustee be also appointed executor, he should renounce probate and trusts of the will in the form required by the Probate Court, and enter the disclaimer on the records of the court: (Coote's Prob. Pr. 192, 6th edit.)

Q.—A. (a trustee of real estate for B.) purchases the estate from B. soon after he attains twenty-one ; can A. make such a title as a purchaser from him is bound to accept, and if the purchaser does accept the title, does he incur any, and what, liabilities to B. ?

A.—The sale to A. may be avoided by B. without showing any fraud on A.'s part, for a trustee is not allowed by equity to purchase the trust estate, and cannot, therefore, compel a purchaser to take the title, but should he do so with notice of the trust, he stands in no better position than the trustee: (see St. Eq. § 322, &c. ; *Fox v. Mackreth*, 1 L. C. Eq. 92, 2nd edit.)

Q.—What are assets ?

A.—Assets in the modern acceptation of the term mean all the property of a deceased person, both real and personal, which can be made available for the payment of his debts and legacies ; assets are real or personal, and as to distribution, legal or equitable: (see Matt. Exors. 264, 2nd edit. ; Sm. Man. sec. 469.)

Q.—If a man die seised of lands, are they liable as against his devisee or heir-at-law for the payment of his debts of both kinds, or either and which ?

A.—All estates in fee simple which the owner has not by his will charged with or devised subject to the payment of his debts, are now liable to be administered in equity against the heir or devisee for the payment of all the just debts of the deceased owner, as well debts on simple contract as on specialty: (3 & 4 Will. 4, c. 104.)

Q.—The stat. 3 & 4 Will. 4, c. 104, renders freehold and copyhold estates liable to the payment of specialty and simple contract debts. Under the statute are these legal or equitable assets ; and is there any class of creditors entitled to be paid their debts before others ?

A.—Estates rendered liable for the payment of debts by the 3 & 4 Will. 4, c. 104, are equitable assets. However, all creditors by special contract, in which the *heirs are bound*, were formerly to be paid the full amount of the debts due to them before any of the creditors by simple

contract, or by specialty in which the heir is not bound, were to be paid any part of their demands : (see Will. R. P. 80, 13th edit.) But this preference is now taken away by the 32 & 33 Vict. c. 46.

*Q.*—A testator charges all his estate with the payment of his debts ; are creditors by simple contract, by such will, on a level with specialty creditors holding security where the heirs are bound ?

*A.*—Yes ; by this charge the preference given by the 3 & 4 Will. 4, c. 104, to creditors by specialty in which the heirs were bound, was taken away, and all creditors placed on an equality : (Will. R. P. 80, 13th edit.), even before the 32 & 33 Vict. c. 46.)

*Q.*—What are dilapidations as between the representatives of a deceased incumbent and his successor, and do they extend to land as well as buildings ? And what are the liabilities of the representatives to the successor ?

*A.*—Dilapidation is the pulling down or destroying the houses of a living, or suffering them to run to waste, or committing waste upon the inheritance of the church, &c. The incumbent is bound to maintain the parsonage and buildings and the chancel of the church in good repair, but not to maintain anything in the nature of ornament. The incumbent is not bound to cultivate the glebe lands in a husbandlike manner, but if he commits any act of waste, such as could not be committed by a tenant for life, his representatives will be liable to an action for dilapidations. By 34 & 35 Vict. c. 43 (Ecclesiastical Dilapidations Act, 1871), dilapidations are a debt recoverable from the late incumbent or his representatives, which the new incumbent must pay over to the Governors of Queen Anne's Bounty, who expend it on the works according to the certificate of the surveyor of dilapidations : (Will. P. P. 78, 10th edit.)

*Q.*—What mines on glebe land can be worked by a parson for his own benefit ? and how can the same be demised for a term beyond his life, and with what consent and to whom must rent and royalties be reserved ?

*A.*—He may work open mines, but may not open new ones without the consent of the patron and ordinary : (Addison on Torts, 232, 3rd edit.)

By the 5 & 6 Vict. c. 108, and subsequent Acts, the mines may be demised for any term not exceeding sixty years, with the consent of the patron and the Ecclesiastical Commissioners, but no premium must be taken. Not more than three-fourths nor less than one-half of the rent is payable to the commissioners, and the rest to the incumbent : (Wood. L. & T. 26, 27, 30, 10th edit.)

#### OUTSTANDING TERMS.—MERGER.

*Question.*—What is an attendant term, and what was the advantage proposed by the assignment of it ?

*Answer.*—A term was said to be attendant when vested in some trustee in trust for the owner of the inheritance out of which it had been raised. The advantage gained by an assignment of it was that it, although satisfied, protected a *bonâ fide* purchaser of the inheritance for value and without notice, from incumbrances created by the vendor, after the



creation of the term and before the sale of the inheritance to the purchaser: (1 St. O. 377, 8th edit.)

*Q.*—What is the present law as to satisfied terms; and what do you consider the proper practice as to assigning them or not, and why?

*A.*—By the 8 & 9 Vict. c. 112, all satisfied terms which were attendant on the inheritance on the 31st December, 1845, were on that day to cease; but if attendant by express declaration they are to continue the same protection against incumbrances as if they subsisted: (sect. 1.) And all terms becoming satisfied after 31st December, 1845, and attendant upon the inheritance, are to cease: (sect. 2.)

The protection given by the first section is a limited protection, for it only protects purchasers who took the assignment before the 31st December, 1845: (Sug. R. P. Stats. 288.) This puts an end to the assignment of satisfied terms as a protection to a person who became such after this Act: and there appears to be no foundation for the notion that any such term can now be kept on foot as an attendant term by assignment: (Sug. Conc. V. 373, 483.)

*Q.*—Did the term ever, and when, become attendant upon the inheritance without an actual assignment to attend?

*A.*—If the term were neither surrendered nor assigned to a trustee to attend the inheritance, it was still considered attendant on the inheritance by construction of law, for the benefit of all persons interested in the inheritance according to their respective titles and estates: (Will. R. P. 417, 13th edit.)

*Q.*—Was there any, and what, advantage to a purchaser in taking an actual assignment of outstanding terms to trustees for the purchaser in trust to attend the inheritance over a general declaration that all persons in whom outstanding terms were vested should stand possessed of them in trust for the purchaser?

*A.*—There was great advantage in taking an actual assignment of a term over a mere declaration of trust, as the latter would have afforded no protection whatever against a subsequent purchaser, without notice, for valuable consideration, who had obtained an assignment of the term: (see 1 Hughes' Pract. Sales, 558, 2nd edit.)

*Q.*—If an outstanding term had never been assigned to attend the inheritance, at whose expense was such assignment made?

*A.*—The practice was for the vendor to be at the expense of deducing the title to the term, and the purchaser to defray the expenses of the assignment: (2 Hughes' Pract. Sales, 233, 2nd edit.)

*Q.*—What is meant by the merger of a term of years?

*A.*—Where a person is possessed of a term of years, and afterwards becomes possessed of the freehold, whether in fee, in tail, or for life, if both estates are in the same right, and no other estate intervene, the term will become swallowed up in the freehold or (as it is technically termed) *merged* in it: (Will. R. P. 414, 13th edit.; *et ante*, p. 205.) (*a*)

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(*a*) By the 1873 Act, c. 66, s. 25, sub-s. 4: There will be no merger by operation of law only in the future, if the beneficial interest is not merged in equity.

**Q.**—What is the difference between merger, suspension, and extinguishment?

**A.**—Merger is defined in the preceding answer; suspension is the partial extinguishment of the interest for a time; while extinguishment is the destruction of a collateral thing in the subject out of which it is derived: (Whart. Law Lex. 605, 606, 4th edit.)

**Q.**—An estate is granted to A. for 1000 years, subject thereto to B. for life, remainder to C. in tail, with reversion to D. in fee. To whom should the term be surrendered for the purpose of merging it?

**A.**—The term must be surrendered to B., the tenant for life, his being the next succeeding estate of freehold: (see Will. R. P. 414, 13th edit.; Burt. Comp. 896 *et seq.*)

**Q.**—A., seised in fee, demises to B. for a term in mortgage; A. then mortgages the equity of redemption to C. in fee; A. next pays off B.'s mortgage, and desires to merge B.'s term; how is this to be effected?

**A.**—Since the 8 & 9 Vict. c. 112, a deed of surrender is not absolutely necessary to merge the term; an acknowledgment of the receipt of the money signed by the mortgagee (usually indorsed on the mortgage-deed) is sufficient: (Hughes' Conv. 443.)

**Q.**—Will a term under any circumstances merge in a term of shorter duration?

**A.**—Yes, a term of years will merge in the immediate *reversion* for years even when the term in reversion is of shorter duration than the term on which it is expectant. For merger is not confined to cases where one of the coinciding estates is greater than the other in point of *quantity of interest*: (1 St. C. 314, 8th edit.; Burt. Comp. 899.)

**Q.**—A. has a lease for thirty years, and the same lessor makes another lease of the same property to B. for sixty years; the lessor afterwards sells and conveys the freehold to C., and it becomes necessary to merge the thirty years' term; how is this to be effected?

**A.**—If the terms are common law terms, the latter would only be an *interesse termini*, and would not prevent a surrender to the freeholder: (Burt. Comp. 907.) A. might, therefore, surrender his term to C., then B.'s term (being to commence on the determination of A.'s estate) would come into possession, and there would be an effectual merger of A.'s term. However, if A. attorns to B., it seems the surrender may be made to him: (*Edwards v. Wickwar*, L. Rep. 1 Eq. 403.)

**Q.**—If a tenant for years dies, having appointed the person who is seised of the immediate freehold to be his executor, will the term merge or not? Give a reason for your answer.

**A.**—The term will not merge, for the executor is recognised by the law as usually holding only for the benefit of creditors and legatees, that is, *en autre droit*: (1 St. C. 314, 8th edit., *et supra.*)

**Q.**—When terms of years are created by settlement, what are the events usually expressed in the proviso for cesser of such terms?

**A.**—By inserting in the deed by which the term is created a proviso that it shall cease not only at its expiration by lapse of time, but also in

the event of the purposes for which it is created being fully performed and satisfied, or becoming unnecessary, or incapable of taking effect: (Will. R. P. 413, 13th edit.)

### BONDS, &c.

*Question.*—In preparing a bond *from two* persons, what should be attended to in the form of it to make it effectual against both or either; and, supposing one of the obligors to be merely a guarantee for the other, what should such a guarantee require for his security from his co-obligor?

*Answer.*—In the first case the bond should be made joint and several, and, in the second, the guarantee should require from his co-obligor a counter-bond (Will. P. P. 341 *et seq.*, 10th edit.) or warrant of attorney.

*Q.*—Suppose there are two partners, and they give their joint bond for payment of money to W., and one of such partners dies; what extent of remedy has the obligee against the surviving partner, and against the representative of the deceased partner?

*A.*—At law only the surviving partner could be sued; in equity the representative of the deceased partner might be sued also (see Will. P. P. 351, 10th edit.); both can now be sued.

*Q.*—What is the meaning of a “joint and several liability?” Give the form of a joint and several covenant by three covenantors. How would the release of one of these affect the others?

*A.*—In a joint and several liability, the covenantors are liable both collectively and individually. The following is a form of covenant:—“And the said (covenantors) do hereby, for themselves, their heirs, executors and administrators, jointly, and each of them doth hereby, for himself, his heirs, executors and administrators, severally covenant, &c.” The release of one of these covenantors would discharge the others, although the liability is several as well as joint.

*Q.*—A. and B., not partners, are to give their bond to C. for the payment of a certain sum of money; how is the obligation to be made, so that in case B. should die and leave A. surviving, C. may have a legal claim upon B.’s representatives?

*A.*—Make the bond joint and several.

*Q.*—What is a *chose in action*, and to what description of property is it applied?

*A.*—A *chose in action* is a phrase which is sometimes used to signify a right of bringing an action, and at others the thing itself which forms the subject-matter of the right, or with regard to which that right is exercised; but it more properly includes the idea of the thing itself, and the right of action as annexed to it. The description is applied to debts, as money due on bonds: (see Holth. L. D. 2nd edit.; 2 St. C. 10, 44, 8th edit.)

*Q.*—Can a *chose in action* be legally assigned, or by what mode is the transfer of such property effected?

*A.*—A *chose in action* could not (with the exception of bills and notes and bail bonds) be assigned at law ; but such assignments were recognised in equity. The form of assigning a *chose in action* at law was in the nature of a declaration of trust, and a power to the assignee to use the name of the assignor in order to recover the possession. No such power was required in equity, as *choses in action* were there assignable : (2 St. C. 44, 8th edit. ; St. Eq. §§ 1040, 1057*a* ; *Row v. Dawson*, 2 L. C. Eq. 612, 2nd edit.) And now (by 18 & 19 Vict. c. 111) the indorsee of a bill of lading and (by the 30 & 31 Vict. c. 144) assignees of life policies, and (by 31 & 32 Vict. c. 86) assignees of marine policies, may sue thereon in their own names : (*ante*, p. 17.) By the 1873 Act, s. 25, sub-s. 6, they are assignable at law if absolutely assigned in writing and notice given to the debtor.

*Q.*—How can the right to a sum of money owing be transferred by the creditor to a third party ? And what are the forms attending such transfer, and what precautions are to be taken by the purchaser to guard his title on the transfer being completed, as distinguished from a transfer of an estate in land ?

*A.*—By assignment in writing the power of attorney will no longer be necessary, but to perfect his title the assignee should immediately give notice in writing to the debtor to comply with 36 & 37 Vict. c. 66, s. 25, sub-s. 6, and in order to prevent any subsequent assignee without notice doing so, and thus gaining priority, or to prevent payment of the debt to the assignor, or the debt passing to the trustees of the assignor in case of his bankruptcy if a trader : (see St. C. *ubi sup.* ; Sm. Man. sect. 436.)

## COPYRIGHT.

*Question.*—What is the duration of the copyright in a book ?

*Answer.*—Copyright endures for the life of the author, and for seven years after his death ; but if the term of seven years expires before the end of forty-two years from the first publication, it endures for such period of forty-two years ; also if the book is published after the death, the copyright endures for forty-two years from such publication : (5 & 6 Vict. c. 45, s. 3.)

*Q.*—What is the law as to the copyright of an article published in an encyclopædia, when such article has been composed on the terms that the copyright shall belong to the proprietor of the work and shall be paid for by him, and the author reserves no rights ?

*A.*—The copyright will belong to the proprietor of the work for the same term as is given by the Act to authors of books, and after the term of twenty-eight years from the first publication of such article the right of publishing the same in a separate form will revert to the author for the remainder of the term given by the Act, and during such term of twenty-eight years the proprietors must not publish any such article separately without previously obtaining the consent of the author or his assigns : (5 & 6 Vict. c. 45, s. 18.)

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45 & 46 Vict.	c. 38, Settled Land Act...	...	...	...	...	244, 334
"	39, Conveyancing Act, 1882,	234, 253, 254, 316, 333, 364, 374				
"	75, Married Women's Property Act...	207, 231, 232, 235, 236, 237, 239, 278, 356				
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## E Q U I T Y . (a)

IN MATTERS AS ADMINISTERED UNDER THE USUAL JURISDICTION OF THE  
CHANCERY DIVISION OF THE HIGH COURT OF JUSTICE.

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### GENERAL NATURE AND OBJECTS OF EQUITY JURISPRUDENCE.

*Question.*—How might “Equity” be defined?

*Answer.*—Equity might be defined to be a portion of justice, or natural equity, not embodied in legislative enactments or in the rules of the common law, yet modified with a due regard thereto, and administered where the courts of law could not, or originally did not, clearly afford any or adequate relief, at least not without circuity of action or multiplicity of suits, or where they could not do complete justice between the parties interested: (Sm. Man. sects. 1-19.)

*Q.*—Explain the origin of equity.

*A.*—The origin of equity is involved in some obscurity, but there seems little doubt that the Court of Chancery was called into existence to supply the defects of the common law, and to give relief where the common law did not or could not; the application for relief being made to the King in council, or to the King himself, and latterly to the Lord Chancellor, as keeper of the King’s (or Queen’s) conscience: (see Haynes’ Outl. Eq. 12, 43, 45; Hallam’s Const. Hist. Eng. 344, &c., 9th edit. vol. 1.)

*Q.*—State the distinction between law and equity.

*A.*—It principally consisted in the difference of the subjects over which they exercised jurisdiction, in the kind of relief they administered, and their mode of proceeding: (3 St. C. 467, 8th edit.) (b)

*Q.*—Was there any, and what, difference between the general principles by which a court of equity was guided and those of a court of law?

(a) All Divisions of the High Court are now to administer equity (1873 Act, s. 24), and where there is any conflict between the rules of law and equity the latter are to prevail: (*Ib.* s. 25, sub-s. 11.)

(b) For, as to the first distinction, courts of law adjudicated *in rem* upon titles completed by actual conveyance, and ruled accordingly; but courts of equity adjudicated *in personam*. As to the second, courts of equity decreed the specific performance of mere executory contracts, &c.; but law, even as altered (see *Benson v. Paull*, 27 L. T. Rep. 78), would only award damages for the non-performance: (see Hallilay’s Articled Clerk’s Handbook, 37 *et seq.*) As to the third distinction, they differed in the mode of bringing the point for decision to issue, and, to a great extent, in their mode of proof.

A.—It was a popular mistake that an equity judge decided according to an unbounded discretion, without any regard to strict rules. But there were certain principles upon which courts of equity acted, which were very well settled. The cases which occurred were various, but they were decided on fixed principles. Courts of equity had, in this respect, no more discretionary power than courts of law : (St. Eq. §§ 18, 19, 20.)

Q.—From whence were the principles of equity as administered by our Courts of Chancery derived, and how did they find their way here so as to run together and to control the common law in the administration of justice ?

A.—From the Roman civil law, they found their way here through the ecclesiastics who formed the principal educated class of the period, and were adopted by the Chancellors (who were invariably ecclesiastics till Henry VIII.'s reign) in exercising their jurisdiction : (see Goldsmith's Equity, part I.)

Q.—In what respects did their introduction control the common law ? Did the judges cease to administer law as before with all its defects and shortcomings ? and did they yield a willing obedience to what was then considered to be an usurped power ? Was there not a sharp and long-protracted struggle for supremacy between the "two systems," and in what reign did it cease and what was the result ?

A.—The Court of Chancery mitigated the rigours of the common law and supplied its defects, and gave relief where it did not or could not. The common law judges did not cease to administer law as before, or give a willing obedience, and the struggle did not cease until 1616, when James I., after a long conflict between Lord Coke and Lord Ellesmere, directed that the Court of Equity had power to set aside a judgment obtained by fraud at common law : (see 1 Hallam's Const. Hist. 346, 9th edit.)

Q.—How happened it that, instead of following the example at Rome in a similar case, when the law of the Twelve Tables became interwoven with and absorbed by the Pretorian edicts, together forming one system of law, our Courts of Equity continued to sit in distinct courts, administering justice separately from the common law courts, and how have the two systems been amalgamated ?

A.—This resulted from the attachment of the nation to the old common law of the realm, but equity gradually grew in importance and its advantages were generally recognised. The antagonism of the two courts naturally prevented any fusion. The Judicature Act, 1873 (36 & 37 Vict. c. 66), amended by that of 1875 (38 & 39 Vict. c. 77), has now fused both courts, and enacted a similarity of forms and procedure, and mode of taking evidence, but the Chancery and Common Law divisions are kept distinct, and a great deal of the exclusive jurisdiction is preserved, but in case of conflict between the rules of law and equity those of the latter are to prevail.

Q.—Before the jurisdiction of the court was settled, what were the limits placed to its power ? Mention some of the cases from the Year Books in which its interposition was applied for, by way of illustration.

A.—Before the jurisdiction of the court was settled, its limits in administering relief were almost according to the conscience of the Chancellor, as was remarked by Selden. The cases that occurred at this time were for assaults and trespasses, and a variety of outrages which were cognisable at common law, but for which the party complaining was unable to obtain redress in consequence of the maintenance and protection afforded to his adversary by some powerful baron or by the sheriff, or by some officer of the county in which they occurred: (Calend. Ch. of Eliz.; and see Year Book, 4 Hen. 7.) (a)

Q.—How did it happen that equity became administered separately upon principles and rules, some of which conflicted with those of the common law? And what does the word equity in legal phrase import?

A.—It was found from time to time that the rules of the common law were too harsh or strict, and they were consequently modified by equity, and made more in accordance with natural or real justice. Equity was thus said to “temper the harshness of the common law.” “Equity” is defined *ante*, p. 407: (Sm. Man. sect. 2, &c.)

Q.—Who were the distinguished Chancellors who subsequently reduced the system into order, and to whom above all is the greatest share of merit ascribed in this respect?

A.—These Chancellors were: Lord Bacon, who, by his celebrated ordinances for the regulation of Chancery, gave a systematical character to the business of the court. Then followed Sir H. Finch (afterwards Earl of Nottingham), who, during the nine years he presided in the court, built up a system of jurisprudence and jurisdiction upon wide and rational foundations, which served as a model for succeeding judges, and gave a new character to the court; hence he has been styled “the father of equity.” Lord Hardwicke was the next Chancellor who completed the structure begun and planned by Lord Nottingham: (see St. Eq. §§ 51, 52.)

Q.—What was the rule of interpreting the statute law in equity? and did it differ from that of common law? (b)

A.—There was not a single rule of interpreting laws, whether equitably or strictly, that was not equally used by the judges in the courts both of law and equity. True, a case was sometimes said to fall within the *equity*, or, at others, to be out of the equity, of an Act of Parliament. But here, by equity was meant nothing but the sound interpretation of the law. Each endeavoured to fix and adopt the true sense of the law in question; neither could enlarge, diminish, or alter that sense in a single tittle: (2 St. C. 70, 8th edit.; St. Eq. § 15.)

Q.—What were the peculiar objects of jurisdiction of courts of equity? Give *exempli gratia* instances under each head. (c)

A.—They were said to be the following: (1) *accident*, as where public

(a) We have no doubt the question is taken from Haynes' Outlines of Equity, to which the student is referred.

(b) Also put in this form: With what latitude did equity construe statute law?

(c) The following question is answered in the above chapter: Give a short outline of the peculiar powers and duties of a court of equity.

stock directed by will to be set apart to answer an annuity was reduced by Act of Parliament, equity would interfere by decreeing the deficiency to be made up against the residuary legatees, on the ground of accident; (2) *fraud*, as where a trustee committed a breach of trust; and (3) *trusts*, as where a use was engrafted on a use which the Statute of Uses could not operate upon, but was a mere benefit or trust in equity: (Sm. Man. sect. 62 *et seq.*)

Q.—What are the three principal cases in which the Court of Chancery granted relief, as stated by Lord Coke?

A.—They were “covin, accident, and breach of confidence:” (see 4 Inst. 84.)

Q.—Mention some of the principal heads of the court’s equitable jurisdiction.

A.—They were accident, mistake, fraud, legacies, donations *mortis causa*, trusts and trustees, specific performance, account, administration, mortgages, apportionment and contribution, partnership, election, satisfaction, partition, interpleader, injunction, *ne exeat regno*, infants, lunatics, and married women, discovery, &c.: (Sm. Man.) (a)

Q.—What were the general heads of remedial equity?

A.—Mr. Smith gives the three following under the head of remedial equity: accident, mistake, and fraud: (Sm. Man. tit. 1, chaps. 1-4.)

Q.—State some of the instances within the statutory jurisdiction of a court of equity as distinguished from its original jurisdiction.

A.—The court of equity had original jurisdiction in uses, trusts, accident, fraud, the guardianship of persons under disability, &c., while a few of the instances of its statutory jurisdiction were:—applications under the Settled Estates Act; the power of trustees to pay money into court under 10 & 11 Vict. c. 96; of making vesting orders and appointing new trustees under the Trustee Act of 1850; relieving tenants from forfeiting leases for breach of covenant to insure under 22 & 23 Vict. c. 35, and very many others.

Q.—What approach was made by the Legislature during the present reign to endow courts of equity with common law powers; and also the common law courts with powers exercised only theretofore in equity, with a view of promoting an amalgamation of the two systems?

A.—By 14 & 15 Vict. c. 83, s. 8, courts of equity might obtain the assistance of a common law judge instead of sending cases for the opinion of a common law court. By the 21 & 22 Vict. c. 27, and the 25 & 26 Vict. c. 42, courts of equity might award damages and cause questions of fact to be tried by a jury before the court itself. By the Common Law Procedure Act, 1852, common law courts might give relief before trial in ejectment for non-payment of rent or mortgage money, and might, by the Common Law Procedure Act, 1854, grant injunctions and writs of *mandamus*, and other discovery, &c. And they might relieve in case of forfeiture for non-insurance or non-payment of rent, by the Common Law Procedure Act, 1860.

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(a) The following question is answered by the above: Mention some instances in which, in substance, a remedy could only be obtained in a court of equity.

**Q.**—In what cases had equity jurisdiction exclusive of the common law?

**A.**—In those cases where courts of common law could not grant any relief. Notwithstanding the 17 & 18 Vict. c. 125, and the 23 & 24 Vict. c. 126, and other Acts, equity retained exclusive jurisdiction over uses and trusts; specific performance of contracts not comprising a public duty (see *Benson v. Paull*, 27 L. T. Rep. 78); partition; granting the mortgagee's right of foreclosure, or enforcing a mortgagor's right of redemption where the right is gone at law; also in the guardianship of infants, idiots, lunatics, married women, and other persons under disability (see Haynes' Tab. Anal. of Eq. Jur.); in nearly all cases of accident, mistake, and fraud, in election, marshalling assets, bills of peace, perpetuating testimony, *ne exeat regno*, and in winding-up companies.

**Q.**—In what cases had it concurrent jurisdiction? and state any instances in which, on account of the more efficient remedy in equity, the common law procedure had fallen into disuse.

**A.**—In those cases where courts of law did not originally afford any relief or even adequate relief, but had since given such relief or complete relief, then courts of law and equity had a concurrent jurisdiction: (St. Eq. §§ 64 i, 80.) As in some cases of accident, mistake, forfeiture, and fraud, granting specific performance of contracts comprising a public duty (see *Benson v. Paull*, *sup.*), or damages in specific performance or injunction cases; enforcing the delivery up of specific chattels; granting injunctions; discovery, interpleader, and set-off; also in partnership and administration, but the jurisdiction here was of a very limited application, and in account it had fallen almost into entire disuse: (see St. Eq. §§ 442, 534; Haynes' Tab. Anal. of Eq. Jur.)

**Q.**—In what cases had it auxiliary jurisdiction? (a)

**A.**—Discovery; perpetuating testimony; examination *de bene esse*; bills of peace; and bills to establish wills: (Haynes, *ubi sup.*; Sidney Smith's Eq. Pr.) (b)

**Q.**—In what cases had courts of equity no jurisdiction, or declined to exercise it?

**A.**—Where it was clear that courts of law did always afford adequate and complete relief without the aid of a court of equity, and without circuity of action and multiplicity of suits, and could take due care of the rights of all persons interested in the property in litigation, courts of equity had no jurisdiction: (Sm. Man. sects. 16, 17.)

Courts of equity declined to exercise their jurisdiction in cases where one party had no more equity than another (St. Eq. § 64, c.), or where both parties were *in pari delicto*, unless public policy would be promoted

(a) This and the two preceding questions have also been asked to this effect: Mention, first, what matters are not comprised within the scope of the common law; and, secondly, the kinds lately conferred upon the courts of the latter.

(b) As to what matters were within the exclusive, concurrent, and auxiliary jurisdiction of the court is by no means easy to state with certainty, the Procedure Acts of 1852 and 1854, 1860, and other statutes, having given the courts of law jurisdiction in so many cases formerly cognisable in equity only. However, as text writers still retain their former divisions, we have thought it safer to follow, with very slight modifications, such divisions.



by such interference (*Id.* §§ 293, 303, 304), or where under the circumstances complete justice would not be done: (*Id.* § 895 *et seq.*)

**Q.**—Have the practice and procedure of the late Court of Chancery any application to the Chancery Division of the High Court of Justice? If so, to what extent?

**A.**—Where no other provision is made by the Act or the Rules of Court the old procedure and practice remain in force: (see sect. 21 of Judicature Act, 1875, and note to Rules of Court.)

The alterations are limited to proceedings by writ and statement of claim, &c. to judgment, where formerly such proceedings were taken by bill or information; the proceedings after judgment are as before, and so are the proceedings by petition, or summons.

Appeals are now in the nature of rehearings, and made by motion on notice; within a more limited time than formerly; further evidence is admitted, and enrolment of decree to prevent appeal is done away with.

**Q.**—Enumerate the principal heads of business which by the Judicature Act are assigned to the Chancery Division of the High Court of Justice.

**A.**—1. All causes and matters pending in the Court of Chancery at the commencement of the Act.

2. All causes and matters to be commenced after the commencement of this Act under any Act of Parliament by which exclusive jurisdiction, in respect to such causes or matters, has been given to the Court of Chancery or to any judges or judge thereof respectively, except appeals from County Courts.

3. All causes and matters for any of the following purposes:—

The administration of the estates of deceased persons.

The dissolution of partnership, or the taking of partnership or other accounts.

The redemption or foreclosure of mortgages.

The raising of portions or other charges on land.

The sale and distribution of the proceeds of property, subject to any lien or charge.

The execution of trusts charitable or private.

The rectification, or setting aside or cancellation of deeds or other written instruments.

The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases.

The partition or sale of real estates.

The wardship of infants and the care of infants' estates.

And all matters within the jurisdiction of the court, under 44 & 45 Vict. c. 41.

**Q.**—Selden hath said, "For law we have a measure and know what to trust to. Equity is according to the conscience of him that is Chancellor, and, as that is larger or narrower, so is equity." Was this an accurate description of equity as administered in our courts? State the grounds of your opinion.

**A.**—The opinion of Selden was not an accurate description of equity as administered in our courts of the present time, whatever it might have been formerly, for, as before seen, there were certain principles on which

courts of equity acted, which were very well settled. The cases which occurred were various; but they were decided on fixed principles. Courts of equity had, in this respect, no more discretionary power than courts of law: (see further, *ante*, pp. 395-6.)

*Q.*—Was there any, and what, difference in the consideration of *choses in action* in courts of law and equity?

*A.*—It was a rule of the common law, with a few exceptions, that no *chose in action* could be assigned to third persons. Courts of equity, however, gave effect to assignments for valuable consideration of *choses in action*: (see St. Eq. §§ 1039, 1040 c., 1044, 1050, 1057; *Row v. Dawson*, 2 L. C. Eq. 612, 2nd edit.)

*Q.*—When there are two clauses absolutely inconsistent with each other, which clause prevails, the first or the last? and is this rule the same in both deeds and wills, and, if different, in what particular?

*A.*—As a general rule, in a deed, the former clause prevails; as if a grant be made to A. and his heirs in the premises, and by the *habendum* it is restricted to his life, the *habendum* would be rejected as repugnant to the estate of inheritance conferred on him by the premises. In wills, the general rule is that the latter clause shall prevail, as implying a change in the testator's mind: (Burt. Comp. 512, 601, 602; 1 Hughes' Pract. Sales, 295, 297, 2nd edit.)

### *General Maxims of Equity.*

*Q.*—State a few of the general maxims of equity jurisprudence, and explain shortly the meaning of each.

*A.*—"Equity will not suffer a right to be without a remedy" is the first maxim; but this only means rights which are considered such both at law and in equity.

"Equity follows the law" is another. This means that equity is governed by legislative enactments and rules of law in regard to legal estates, &c., and is regulated by the analogy of such legal estates, &c., and legislative enactments, &c., affecting the same in regard to equitable estates, &c., if any analogy subsists: if in each case there are no peculiar circumstances rendering it necessary to deviate from this rule.

It is a maxim that "*Vigilantibus, non dormientibus, æquitas subvenit*"; this means that equity discountenances laches.

Another is, "He who seeks equity must do equity;" this means, must do equity in the transaction in which the relief is sought: (see further St. Eq. and Sm. Man., tit. "General Maxims," *et infra*.)

*Q.*—Equity is said to follow the law. Does it not sometimes go beyond the law, as in the case of trusts executory? What are they?

*A.*—It does. Trusts executory are trusts raised by a stipulation or direction to make a settlement upon trusts which do not appear to be formally and finally declared by the instrument creating them. Equity endeavours, in construing such trusts, to carry out the presumable intention of the settlor or testator, and may thus be said "to go beyond the law:" (Sm. Man., sect. 236.)

*Q.*—Discuss the maxim "*Vigilantibus, non dormientibus, æquitas subvenit*," and give reasons *why* delay should in justice be a bar to relief.

A.—The meaning of the maxim is, that equity discountenances laches. It would, in case of laches, in many cases, be impossible to interfere without doing injustice to third persons. In general, nothing can call a court of equity into activity but conscience, good faith, and reasonable diligence: (see Sm. Man. sect. 33.)

Q.—Does equality mean equity? How is this exemplified in the case of a joint purchase?

A.—It is a maxim that “Equity is equality.” Therefore equity leans against joint tenancy, on account of the *jus accrescendi* attendant and the equality being one of chance merely. Consequently, on a joint purchase by two persons who advanced the purchase money in unequal shares, the survivor will be held a trustee for the deceased’s representatives to the amount he advanced: (Sm. Man. sect. 35; *Lake v. Gibson*; *Lake v. Craddock*, 1 L. C. Eq. 161, 162, 3rd edit.)

Q.—Will the court give relief where one party has no more equity than another, or will it leave the parties to their legal remedy?

A.—It is a maxim that “Where the equities are equal, the law prevails.” The court will, therefore, only enforce the legal remedy (St. Eq. § 64 c.; Sm. Man. sect. 34), which may be obtained in any division of the High Court.

Q.—Would the court grant relief in favour of legatees or devisees under a will defectively executed? Give the reason for your answer and mention the maxim of equity applicable thereto.

A.—No; the court cannot grant relief in such a case, on the principle that “Equity follows the law.”

Q.—Give an instance of the application of the maxim that “Where there is equal equity the law must prevail.”

A.—The following exemplifies this maxim: If a trustee sells to a *bonâ fide* purchaser for value, without notice of the trust, and passes to him the legal estate, the legal title of the purchaser prevails over the equitable one of the *cestui que trust*: (St. Eq. § 64 c., and notes; *Bassett v. Nosworthy*, 2 L. C. Eq. 1 *et seq.*, 2nd edit.; Sm. Man. sect. 34.)

Q.—Explain the maxim “*Qui prior est tempore potior est jure*,” and the limitations of its application.

A.—This means that, where equities are equal, the first in time shall prevail. This is the last rule resorted to, and a court of equity will not prefer one to another until it finds, on an examination of their respective merits, that there is no other sufficient ground of preference between them: (see St. Eq. 23, 24, 4th edit.)

Q.—Discuss briefly the defence of a purchaser for valuable consideration without notice, giving cases in which it is and is not sustainable.

A.—The purchaser by such plea admits that a good title did not pass to him: it likewise assumes a conflict between a legal and an equitable title, or between the holder of a title legal or equitable, and a person who is trying to assert an equity against him. Such plea cannot be used by a person having an equitable title against another having equal equity who is prior in point of time.

If the purchaser without notice has the legal estate in addition, or the

best right to call for it, his claim is indisputable, as where the equities are equal the law prevails: (see Sug. Eq. pp. 26-28, 4th edit.)

Q.—Explain the meaning and effect of the maxim that “Equity acts *in personam*, the law acts *in rem*.”

A.—This means that equity could give relief by proceeding against the contracting parties themselves, while a court of law only adjudicated upon titles completed by actual conveyance. Thus, if A. agreed to sell, and B. to purchase, real estate, equity could, though the property be situate abroad, compel either A. or B., if within the jurisdiction, to fulfil his contract in specie; whereas a court of law had no power to order a conveyance, but only to give damages for breach of the contract, or to decide upon the conveyance when actually made: (see *Penn v. Lord Baltimore*, 2 L. C. Eq. 837, 853, 3rd edit.)

So at law, an agreement not by deed for the use of an easement conferred no title, and might be recalled though value had been paid for it: (*Wood v. Leadbitter*, 13 M. & W. 838.) But in equity such an agreement would, if for value, be enforced, and the owner of the servient tenement compelled to execute a proper deed of grant: (*Duke of Devonshire v. Eglin*, 14 Beav. 530; and see Haynes' Eq. 22, 23.)

Q.—Mention any general maxims that occur to you, with illustrations of their practical working.

A.—In addition to what has already been said, we may add that another maxim is that “Equity looks upon that as done which is agreed to be done,” as illustrated *infra*.

Q.—What is meant by the equitable doctrine of constructive conversion?

A.—It is that money directed to be employed in the purchase of land, and land directed to be turned into money, are generally regarded as that species of property into which they are directed to be converted. For equity looks upon that as done which ought to be done: (Sm. Man. sect. 42; *Fletcher v. Ashburner*, 1 L. C. Eq. 659, 2nd edit.)

Q.—If the vendor dies before payment of the purchase money, to whom is it payable?

A.—To his personal representative; for real estate contracted or articulated to be sold is considered or reputed as money; and equity considers that as done which is agreed to be done: (see Sm. Man. sect. 42; Sug. Conc. V. 122.)

Q.—What is the meaning of the expression “a conversion out and out.”

A.—A testator can by his will so change the nature of his real estate, and impress upon it the character of personal estate, as to exclude all questions concerning it between his real and personal representatives after his death. This is called “conversion out and out:” (*Berry v. Usher*, 11 Ves. 91; Wms. Exors. 585, 5th edit.)

Q.—A testator devises Blackacre to trustees for sale and division of the proceeds amongst six persons, one of whom dies in his lifetime; he devises the rest of his real estate to B., and bequeaths his personal estate to C. On the sale of Blackacre, who is entitled to the sixth share of the proceeds?

And if the person who at the death of the testator became entitled to that share should afterwards die intestate, before the actual receipt of the share, who would take it in that event?

A.—B., the residuary devisee, is entitled to the one-sixth share of the proceeds of the real estate directed to be sold; but, as personal estate, on his death intestate, it would vest in his administrator in trust for his next of kin: (see *Ackroyd v. Smithson*, 1 Bourne's Chancery Cases, 502; *Smith v. Caxton*, 4 Madd. 484.)

Q.—What is the law that governs contracts; and, as a general rule, can a contract that is void by the law of the country where it is made be enforced here?

A.—The *lex loci contractus*, with the exception where the parties at the time of making the contract had a view to a different kingdom: (Chit. Cont. 91, 11th edit.) As a general rule a contract void by the law of the country where it is made cannot be enforced here. But the foreign law must be clearly proved by the party objecting.

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### ACCIDENT AND MISTAKE.

*Question.*—In what cases falling under the head of accident was relief afforded in equity?

*Answer.*—In such unforeseen and injurious occurrences as were not attributable to mistake, neglect, or misconduct, if it could be granted with full justice, and if courts of law could not, or originally could not, afford edequate relief. As if stock, directed by will to be set apart to answer an annuity, was reduced by Act of Parliament, equity would decree the deficiency to be made up against the residuary legatees. Also in the case of destroyed, lost, or suppressed deeds; and in certain cases of defective executions of powers, &c.: (Sm. Man. tit. "Accident.")

Q.—What was the relief given in equity against accident?

A.—The relief granted was putting the parties in the same position, as nearly as might be, as they would have been in but for the accident, if there was no adequate remedy at law and the accident occurred was of an unforeseen and injurious nature: (see St. Eq. tit. "Accident.")

Q.—After a contract for a sale who must bear any loss that may happen to the estate before the completion of the sale; and who is entitled to any benefit that may accrue to the estate during the same time?

A.—The estate belongs to the purchaser from the time of the contract; he is therefore entitled to any benefit that may accrue to the estate after this time, and consequently will have to bear any loss which may happen to it during the same period: (see *Ld. St. Leonards' Handy Book*, 46, 6th edit.)

Q.—A. gives a bond to B. to secure payment of a debt, the bond is lost: has B. any, and what, means to compel the payment of it?

A.—A person might always come into a court of equity for the payment of a lost bond; because, until a recent period, no relief was given at law on account of the want of a profert. And it was often proper to grant relief upon the terms of the party giving a bond of indemnity, and a court

of law could not insist on such a bond as part of the judgment (Sm. Man. sect. 75); and in equity the decree of the court was sufficient indemnity: (*England v. Tredegar*, L. Rep. 1 Eq. 344.) B. can now sue in any division of the High Court.

Q.—If an estate be sold for a certain sum of money and an annuity for the life of the vendor, and the vendor dies before the receipt of any of the annuity, will any relief be granted his representatives?

A.—No; for the vendor's death might have been foreseen, and provided for. It is not "an unforeseen, &c.," occurrence: (St. Eq. § 104; Sm. Man. sect. 67.)

Q.—Define "mistake" as remediable in equity. Give some instances in which the court will, and in which it will not, give relief on the ground of mistake.

A.—A mistake as remediable in equity may be defined to be an act which would not have been done, or an omission which would not have occurred, but from ignorance, forgetfulness, inadvertence, mental incompetence, surprise, misplaced confidence, or imposition.

Where the mistake is unilateral and the sufferer is the person by whom it is made, relief will not be granted unless there is some circumstance which gives rise to a presumption that there has been some undue influence, misrepresentation, imposition, mental imbecility, surprise, or confidence abused; and even where this is the case, equity will not interfere as against a *bonâ fide* purchaser for valuable consideration without notice.

In regard to mistakes in matters of *law* and fact, see *infra*.

Q.—Will relief be granted against a mistake of a matter of law?

A.—Not as a rule; the maxim being *Ignorantia legis non excusat*; yet if the mistake is one of title, arising from ignorance of a principle of law of such constant occurrence as to be understood by the community at large this gives rise to a presumption that there has been some undue influence, misrepresentation, &c., exercised, so as to entitle the party to relief: (see Sm. Man. tit. 1, ch. 2.)

Q.—*Ignorantia legis non excusat*. Does this maxim of law apply to equity? State any one or more instances of cases that occur to you.

A.—This maxim applies to equity as a general rule, as if A. and B. gave their joint bond to C., and C. releases A., supposing B. would remain liable, C. will get no relief in equity on the ground of mistake of law. So if A. has a power of appointment and executes it absolutely, without reserving a power of revocation, upon a mistake of law that being a voluntary deed it was revocable, no relief will be granted: (see St. Eq. §§ 111, 112.)

Q.—Will the court relieve against acts performed under mistaken notions of fact?

A.—Yes; as the maxim is *Ignorantia facti excusat*: (1 Co. 177.) But the mistake must be unilateral, and the fact material, not doubtful, and a fact that could not be ascertained by using ordinary diligence, and of which the other party was under a legal obligation to inform the mistaken person; for, then, a similar presumption arises to that which



causes the court to give relief in certain cases of ignorance of law : (Sm. *ubi sup.*)

*Q.*—What is the distinction in granting relief, under the head of mistake, between a mistake in a matter of law, and a mistake in a matter of fact ?

*A.*—This distinction we have pointed out in the two preceding answers. The ground of this distinction seems to be, that as every man is presumed to know the law, and to act upon the rights which it confers or supports, when he knows all the facts, it is culpable negligence in him to do an act or make a contract, and then to set up his ignorance of law as a defence. But no person can be presumed to be acquainted with all matters of fact ; neither is it possible by any degree of diligence in all cases to acquire that knowledge ; and, therefore, an ignorance of fact does not import culpable negligence : (St. Eq. § 140.)

*Q.*—What is the effect of an appointment under power exercised by the appointor, who imposes a condition to be performed by the appointee which is not authorised by the power ?

*A.*—If the appointee is an object of the power the appointment to him will be good, but the condition invalid : (see *Roach v. Trood*, 3 Ch. Div. 429.)

*Q.*—Will the court relieve against the defective execution of a power, and on what general principles ?

*A.*—In the absence of any countervailing equity, relief will be granted where the defect is not of the very essence of the power, and the defective execution was occasioned by accident and is in favour of a charity, or of purchasers, creditors, or a wife, or legitimate child, or an intended husband : (see Sm. Man. sect. 78 ; *Tollett v. Tollett*, 1 L. C. Eq. 184, 2nd edit.)(a)

*Q.*—When will equity grant relief in the case of the non-execution of a power ?

*A.*—Only where the power is coupled with a trust, or the non-execution was occasioned by fraud. In other cases the court will not relieve, for it would be interfering with the donee's discretion in regard to the exercise of the power : (*Tollett v. Tollett, sup.* ; *Harding v. Glyn*, 2 L. C. Eq. 789, &c., 3rd edit. ; Sm. Man. sect. 79.)

*Q.*—If, in a will or settlement, the usual power to appoint new trustees has been omitted, will equity remedy the inconvenience ; and if so, in what way ?

*A.*—Yes ; the equity division of the High Court will appoint new trustees : (see 1873 Act, s. 34, sub-s. 2 ; St. Eq. §§ 1060, 1082.) And by the 13 & 14 Vict. c. 60, may, on petition, make an order appointing new trustees, either in substitution for, or in addition to, any existing trustee or trustees : (sect. 32.) In other cases where the Act 23 & 24 Vict. c. 145, or 44 & 45 Vict. c. 41, operates it enables the surviving trustee, or his executor or administrator, or the last retiring or continuing trustee, to appoint new trustees.

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(a) But see 22 & 23 Vict. c. 35, as to mode of executing powers.

*Q.*—Suppose a man to have failed to express what he intended to express by his will, or by a deed—did equity give effect to the intention, if it could be proved? Was there any difference between law and equity in such a matter? Explain the difference, if there was any.

*A.*—It was a general rule of each court that parol evidence could not be admitted to explain a patent ambiguity; but might be given to explain a latent ambiguity. And, generally speaking, the rules of construction were the same in each court, for it was a maxim that equity followed the law. But no doubt equity had a more complete and extensive jurisdiction under the head of accident and mistake in such cases than a court of law: (see *St. Eq. tit. "Accident and Mistake."*)

*Q.*—Will equity ever, and on what grounds, rectify instruments under seal?

*A.*—Yes, where there is a mistake in them other than a mistake in law, or if any acts necessary to give the instrument validity have been omitted, and the mistake is clearly made out by satisfactory evidence, or is admitted by the answer, or evident from the nature of the case, or from the rest of the deed, unless other parties have acquired equal equities under it. The ground on which the court interferes is that of mistake. (This jurisdiction is retained by the Chancery Division of the High Court: (*Sm. Man.* 13 ed.; 1873 Act, s. 34, sub-s. 3.)

*Q.*—Upon what principle does equity act in the rectification of settlements?

*A.*—If the settlement, though executed before marriage, purport to be executed in pursuance of marriage articles, and in all cases where there are articles before marriage and a settlement after, the articles are in effect the binding instrument; and if the settlement gives estates or interests different from those which the court would give on the construction of the articles, the settlement will be reformed. But this is between parties to the articles and settlement, and their representatives and mere volunteers, and has not, said Lord Hardwicke, "been carried into execution against a purchaser:" (2 *Spence Eq.* 140, 141.)

*Q.*—In cases of mistake in a written instrument, does it make any difference in the relief granted whether the defendant is one of the parties to the deed, or his heir, or devisee, or a purchaser from him, with or without notice of the mistake?

*A.*—Equity only interferes as between the original parties and those claiming under them in privity, as heirs, devisees, creditors, voluntary grantees, purchasers with notice, &c. As against *bonâ fide* purchasers for value without notice equity will not relieve, because they have an equal equity: (*St. Eq.* § 165.)

## FRAUD.

*Question.*—Give some instances in which equity will set aside a deed or contract, and state the grounds on which the court acts in such instances. (*a*)

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(*a*) Also put thus: What relief will equity give in case of a contract obtained by fraud?

*Answer.*—Equity will set aside a deed or contract when entered into with infants, idiots, lunatics, persons excessively drunk, or under extreme terror, &c., on the ground of actual fraud. It will also set aside contracts in restraint of marriage generally, or in restraint of trade generally, or contracts involving champerty or maintenance, post-obit bonds given by expectant heirs and the like, on the ground of constructive fraud, or as being against public policy : (see Sm. Man. tit. 1, ch. 3, 4.)

*Q.*—Define constructive fraud ; and between what parties standing in a fiduciary relation are contracts and gifts liable to be set aside ?

*A.*—Constructive frauds are acts or omissions which operate as virtual frauds on individuals, or injure the public interests, and are not referable to mere accident or mistake, and yet may have been done without any evil design : (St. Eq. § 258 ; Sm. Man. sect. 134.)

Contracts and gifts between trustee and *cestui que trust*, parent and child, guardian and ward, solicitor and client, doctor and patient, and the like are liable to be set aside : (Sm. Man. sect. 149 *et seq.*)

*Q.*—Can equity interfere with respect to frauds in wills ?

*A.*—Not if the fraud goes to the whole will, for then the proper remedy is exclusively vested in the Probate Division. But it seems the equity division has jurisdiction if the fraud only goes to some particular clauses, &c. : (Sm. Man. sect. 105 ; *Allen v. Macpherson*, 1 H. L. Cas. 191 ; *Melhuish v. Milton*, 3 Ch. D. 27.)

*Q.*—A testator, by his will, having given a pecuniary legacy to A. is induced when in a state of great mental and bodily weakness, and through the fraud, influence, and circumvention of B., to revoke the legacy, and by a codicil to his will to give it to B. himself. Is, or is not, this a case in which, after the testator's death, and assuming that the facts above stated could be clearly established, you would advise A. to have recourse to equity against B. ? If so, state the relief that you would seek to obtain for A. If otherwise, give the reasons for your not recommending the action.

*A.*—I should, in this case, advise A. to issue a writ in the equity division of the High Court against B., claiming that he might be declared a trustee of the legacy for A., which equity might decree, as the fraud only goes to part of the will : (Lewin on Trusts, 50, 4th edit.; and see Sm. Man. sect. 105.)

*Q.*—What will amount to fraud in a purchaser in not apprising the vendor of any advantage of which the latter is ignorant ?

*A.*—If there is any fiduciary relation between a vendor and a purchaser in a negotiation, the purchaser is bound to disclose any fact exclusively within his knowledge which would influence the price of the subject sold, and if he does not do so, this would amount to fraud, and be relieved against. So if a purchaser in any manner induces a vendor to believe the existence of a non-existing fact which might influence the price of the subject contracted to be sold, the contract will be set aside as fraudulent. But simple reticence does not amount to legal fraud. Nor does mere inadequacy of consideration : (*Walters v. Morgan*, 4 L. T. Rep. N. S. 758 ; *Tate v. Williamson*, L. Rep. 2 Ch. App. 55.)

**Q.**—In what case is one contracting party bound to disclose facts which he believes would be operative on the mind of the other?

**A.**—If a person conceals facts and circumstances, which he is under some legal or equitable obligation to communicate to the other, it amounts to a fraud, for which equity will grant relief: (*Pulsford v. Richards*, 17 Beav. 94, 96.) As if a vendor sells an estate, knowing that he has no title to it, or that there are incumbrances on it, of which the purchaser is ignorant, or if the insured does not communicate to underwriters all facts and circumstances which increase the risk. A vendor must also disclose latent defects.

But a purchaser is not bound to communicate his knowledge of the value of the property to the vendor: (*Walters v. Morgan*, 3 De G. F. & J. 718; Sm. Man. sect. 118.)

**Q.**—What are the general principles on which relief is granted where there has been concealment?

**A.**—The principle on which equity will grant relief in case of concealment is, that concealment operates as either an actual or constructive fraud, which is always a ground for equity granting relief: (Sm. Man. sect. 116 *et seq.*)

**Q.**—If A. obtains the conveyance of an estate from B. by fraud, and A. sells the estate to a purchaser, will equity relieve B., and set aside such conveyance, and annul the sale to the purchaser? State in what case the court would, or would not, do so.

**A.**—Equity will give B. priority over the purchaser, if the purchaser had notice, actual or constructive, of the fraud, but not otherwise, for a *bond fide* purchaser without notice has a countervailing equity, and also the legal estate: (St. Eq. §§ 409, 410.)

**Q.**—Suppose a man to have obtained a legal ownership by fraud; on what principle of jurisdiction, and in what way, does equity enforce the right of the person defrauded against the fraudulent legal title?

**A.**—Equity interferes on the ground that there shall be no right without a remedy, for in certain cases of fraud there was no relief at law (see St. Eq. §§ 60, 61), and also on the ground of trust and public policy. Here equity, acting *in personam*, declares the person who has thus fraudulently possessed himself of the property of another a trustee for that other. As, if an agent is employed to purchase for another and purchases for himself, he will be treated in equity as a trustee for his principal, and compelled to transfer the legal title to him: (St. Eq. § 316; Haynes' Eq. 23, 129.)

**Q.**—When is a conveyance of property deemed fraudulent as against creditors or purchasers, and what is the effect of such a conveyance as respects the party making it?

**A.**—All voluntary conveyances are declared void as against *bond fide* purchasers for valuable consideration, and also against creditors to whom the settlor was indebted at the time of such conveyance: (a) (see 13 Eliz. c. 5; 27 Eliz. c. 4; *Twyne's case*, 1 Sm. L. C. p. 1 *et seq.*) As between the parties themselves, however, such conveyances are binding. But

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(a) As to future creditors, see *Barling v. Bishop* (2 L. T. Rep. N. S. 651.)

although the settlor may dispose of the property to a *bonâ fide* purchaser for value, equity will not give its aid to enable *him* to complete a contract of sale against the purchaser : (Sm. Man. sect. 193.)

Q.—Can a creditor whose claim did not exist at the date of a voluntary settlement made by his debtor have it set aside ? Give reasons.

A.—He may do so in those cases where the effect of the settlement is to deprive the settlor of the means of paying certain then existing debts. Lord Hatherley, in *Freeman v. Pope* (L. Rep. 5 Ch. 538), states the law to be that, in the absence of direct proof of intention to defraud, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the then existing debts could not be paid, then the law will presume an intention to defeat and delay creditors such as to bring the case within the statute 13 Eliz. c. 5. In other words, the subsequent creditors whose money, lent by them, must have been applied towards paying the former creditors, have an equity to “stand in their shoes” for the purpose of impeaching the settlement : (Snell, 82, 5th edit.)

Q.—Is an irrevocable voluntary conveyance (accompanied by delivery of possession) made by a solvent person in favour of his child good against subsequent creditors ?

A.—It is, except that if the settlor becomes bankrupt within two years of the date of the voluntary conveyance, it will be void against the trustee in bankruptcy, or if the settlor become bankrupt within ten years unless the party claiming under it can prove the solvency of the settlor : (46 & 47 Vict. c. 52, s. 47.) The corresponding section (sect. 91) in the 1869 Act was confined to *traders*.

Q.—If a donee of a *general* power of appointment over a fund exercises the power, can his creditors claim the fund against the appointee, and purchasers from him ?

A.—Creditors can claim the fund against the appointee, unless the appointment was *bonâ fide* and for value, also against his purchaser if the purchase be not likewise *bonâ fide* and for value : (see *Twyne's case*, *sup.* ; 2 Sug. Pow. 102, 158, 159, 7th edit. ; *Morewood v. South Yorkshire Railway Company*, 3 H. & N. 798 ; *Bowes v. Foster*, 2 H. & N. 779.)

Q.—State some cases in which equity will support a voluntary conveyance ; and in what cases will set such a conveyance aside ; and when will it refuse to interfere ?

A.—If the conveyance is complete, so that no act remains to be done to give full effect to the title, equity will enforce it against the party making or creating it, and his representatives, although it be merely voluntary. But it will, as above stated, set such a conveyance aside in favour of a *bonâ fide* purchaser or of creditors. If there are two voluntary conveyances, and each is *bonâ fide*, equity will not interfere : (Sm. Man. *sup.* ; *Ellison v. Ellison*, 1 L. C. Eq. 199, 2nd edit.)

Q.—In what cases will equity set aside a sale for inadequacy of price ?

A.—Only where the price is so inadequate as to shock the conscience, and amount to conclusive evidence of fraud, or where there is inadequacy and other suspicious circumstances ; as if proper time for deliberation was

not allowed the party injured; or if he was an illiterate person an advantage was taken of his necessities, and the like. But mere inadequacy will not avoid a bargain: (Sm. Man. sect. 123; *Baker v. Monk*, 10 L. T. Rep. N. S. 86; 31 Vict. c. 4.)(a)

Q.—What does equity usually require to establish the validity of a purchase from an expectant heir? and on whom is the onus of proof?

A.—Formerly (1) either a fair consideration to be paid, or (2) that the bargain was made known to and approved by the person to whose estate the expectant hoped to succeed. And it seems that in the latter case such person should have been in a position to relieve the expectant from his difficulties, in order to give the bargain validity: (see Sm. Man. sect. 166; *Earl of Chesterfield v. Janson*, 1 L. C. Eq. 428, and notes, 2nd edit.) By the 31 Vict. c. 4, however, it is enacted that no purchase made *bonâ fide* and without fraud or unfair dealing of any reversionary interest is to be set aside merely on the ground of inadequacy of price: (and see *E. of Aylesford v. Morris*, 8 Ch. App. 484-90.) The onus of proof is on the purchaser: (Sm. Principles, 147.)

Q.—How does equity look on a transaction between father and son just of age or just after he has come of age, on a consideration of love and affection?

A.—With a considerable amount of jealousy, and sees that it is entered into with entire good faith, and will, indeed, require the father to show that the child was really a free agent, and had adequate and independent advice: (see Sm. Man. sect. 149; *Berdoe v. Dawson*, 12 L. T. Rep. N. S. 103.)

Q.—Are there any, and what, cases of fraud against which equity will not relieve? Suppose the parties are *in pari delicto*, what maxim guides the court?

A.—Relief will not be granted when both parties are truly *in pari delicto*; for the maxim is that, "*In pari delicto potior est conditio defendentis et possidentis.*" An exception occurs, however, where public policy would thereby be promoted, as in the case of a gambling security, which is void, and money paid on it may be recovered back: (St. Eq. §§ 298, 303, 304.)

Q.—What is the rule in equity as to time, barring, or not barring, relief against fraud?

A.—In the case of *concealed fraud* time is no bar in equity until such fraud is, or with reasonable diligence might have been, first known or discovered. But if the lands have got into the hands of a *bonâ fide* purchaser for valuable consideration, without notice of the fraud, no action will lie for their recovery against the purchaser: (3 & 4 Will. 4, c. 27, s. 26; Sug. R. P. Stats. 102.)

Q.—Define acquiescence.

A.—It must be an acceding to a given state of things with full knowledge of the facts—mere quiescence is not sufficient.

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(a) But although this is the case, yet equity will not generally enforce an agreement where the price is not fair and adequate: (see *Falcke v. Gray*, 33 L. T. Rep. 297; and see hereon *Law Times*, vol. 33, No. 852, pp. 243 to 245.)



In Wharton's Law Lexicon acquiescence is defined to be "consent either express or implied."

Q.—Can an arbitrator under any, and what circumstances, be made a party in an action for the purpose of impeaching his award?

A.—Yes, upon due proof of misconduct, partiality, fraud, or corruption, and equity will set aside the award: (St. Eq. §§ 1451, 1452, 1498, 1500.) And it will admit evidence of an arbitrator in explanation of his award on the ground of mistake: (*Re Dare Valley Railway Company*, L. Rep. 6 Eq. 429.)

Q.—State shortly the law with respect to contracts entered into for the purpose of promoting marriage for reward, and to gifts on contracts operating unduly in restraint of marriage.

A.—Contracts made with parents or other persons standing in peculiar relations to one of the parties for the purpose of promoting marriage for reward are void, whereby on a treaty of marriage they are to receive a remuneration for promoting the marriage or giving their consent to it.

A contract is void if it is expressly in restraint of marriage generally, or if it is so restricted that it is probable that it may virtually operate in restraint of marriage generally: (see Sm. Man. sect. 139.)

Q.—When was a settlement said to be a fraud on the husband's marital rights?

A.—Prior to the Married Women's Property Act, 1882, where a woman in contemplation of marriage, without the privity of her intended husband, made a settlement to her separate use, or a conveyance in favour of persons for whom she was under no moral obligation to provide, it was treated as a fraud on the husband's marital rights, and would be set aside in equity: (St. Eq. § 273; Sm. Man. sect. 182; *Countess of Strathmore v. Bowes*, 1 L. C. Eq. 364, 3rd edit.)

Q.—Does equity impose any, and what, terms upon a plaintiff seeking to set aside an usurious contract?

A.—Yes; it will interfere only on the terms that the borrower will do equity by paying the lender what is *bond fide* due to him: (St. Eq. § 301; Sm. Man. sects. 40, 729.)

Q.—Under what circumstances will the Chancery Division of the High Court of Justice afford relief against a creditor who has lent money at an exorbitant rate of interest?

A.—In all cases where there has been any unfairness in the transaction, and even without any unfairness where the loan has been made on extravagant terms to remaindermen or reversioners, in which case it grants relief on payment of the amount advanced, with 5 per cent. interest: (*Beynon v. Cooke*, L. Rep. 10 Ch. 389.)

Q.—A. is a money-lender, and, by advertisements, advertises money to be lent "on easy terms," and afterwards lends money to B. on the security of a bill of sale on very hard terms; in an action to set aside the bill of sale what is necessary to be proved, and on whom does the onus of the proof lie?

A.—On proving this representation the onus will lie on the lender to prove that he has clearly explained to the borrower the terms of the loan,

otherwise the bill of sale will be set aside: (*Moorhouse v. Woolfe*, 46 L. T. Rep. 374.)

Q.—A. having sold his expectant interest in real estate, and received the purchase money, afterwards issues a writ to set aside the sale on the ground of fraud, which he succeeds in proving: on what terms will equity grant relief?

A.—On the terms that A. repay the purchaser what he actually paid for the expectancy with reasonable (*a*) interest on that amount; for he who seeks equity must do equity: (St. Eq. §§ 64 c., 301, 707; Sm. Man. *sup.*)

Q.—In the case of voluntary gift by deed *inter vivos*, upon whom, if the gift be afterwards challenged by the donor, will the burden of proof fall, and what must be shown to set the deed aside? State the rule.

A.—The burden of proving the transaction to be fair falls on the person taking the benefit. Proof that the donor knew and understood what he was doing shows such fairness; unless the donor stood in a confidential relation towards the donee, for then further proof of how the intention was produced must be given. If proper proof be not given, equity will set aside the gift on the principle of public policy: (*Huguenin v. Baseley*, 2 L. C. Eq. 528 *et seq. in notis*, 3rd edit.; Sm. Man. sect. 200.)

Q.—State the rule on which equity has acted in setting aside a voluntary donation obtained by one person from another, the donee not standing in any confidential, fiduciary, or other relation towards the donor.

A.—That where there is no fiduciary capacity it will not set aside a voluntary donation without proof of fraud or unfair dealing.

Q.—The like question as to donations from a child to a parent, or person *in loco parentis*.

A.—It will set such a transaction aside in this case unless there is proof that the child was protected by independent advice, and thoroughly understood the transaction: (see Haynes, sect. 5, and cases cited.)

Q.—The like question as to transactions between a solicitor and his client by deed or will.

A.—Equity will not allow such transactions (to any material extent) between solicitor and client *inter vivos*, but will allow a gift by will: (*Hindson v. Weatherill*, 5 De G. M. & G. 301.)

Q.—And between what relations does the rule apply, and against whom principally does equity seek to protect the owner of the property?

A.—The rule applies between parent and child; guardian and ward; trustee and *cestui que trust*; solicitor and client, &c. The court protects the owner of the property against those having an influence over him: (see *Huguenin v. Baseley*, 2 L. C. Eq. 531 *et seq. in notis*, 3rd edit.)

Q.—State some cases in which a party, not having actual notice, will

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(*a*) It must, however, be remembered that the laws against usury are repealed by the 17 & 18 Vict. c. 90.

be held to have constructive notice, so as to affect him in equity the same as if he had received actual notice.

A.—In equity notice to the agent is notice to the principal, since it would be a breach of trust in the former not to communicate the knowledge to the latter. And whatever is sufficient to put a party upon inquiry is, in equity, held to be good notice to bind him. Thus, notice of a lease will be notice of its contents: (see Sm. Man. sect. 190; *Le Neve v. Le Neve*, 2 L. C. Eq. 23, 2nd edit.) But by 45 & 46 Vict. c. 39, s. 3, a purchaser will not be prejudicially affected by notice of any instrument, fact, or thing, unless it is within his own knowledge or would have been, if he had made reasonable inquiries, or if it has, or might, on reasonable inquiry, have come to the knowledge of his counsel, solicitor, or agent in the same transaction.

Q.—Will a party who has attested the execution of a deed be held by equity from that circumstance to be affected with notice of the contents of such deed?

A.—The better opinion is that, being a witness to the execution of a deed will not of itself be notice; for a witness in practice is not privy to the contents of the deed: (see Sug. Conc. V. 614, and the cases there cited.)

Q.—A. having a judgment against B. issues an *elegit*, under which he gets possession of B.'s estate; B. afterwards charges his estate with the payment of an annuity to C., and subsequently to this A. takes a conveyance of the estate from B., in consideration of his judgment debt; has this conveyance any, and what, effect upon C.'s annuity?

A.—It is clear that if A. had notice of the annuity at the time of the conveyance he takes the estate subject to it; and even if he had not notice we presume that his judgment is merged by the conveyance, and the annuity left intact: (see Sug. Conc. V. 520; David. Conc. tit. "Mortgages.")

Q.—In construction of the registry Acts of Anne and Geo. 2, whereby a registered deed takes priority of one unregistered, what relief will a court of equity afford, if the party knew of the unregistered deed?

A.—His title will be postponed, and made subservient to the title of the party whose deed is not registered. For the object of the Registry Acts is only to secure subsequent purchasers and mortgagees against prior *secret* conveyances and incumbrances: (Sug. Conc. V. 578; Sm. Man. sect. 188.)

Q.—A devisee of land in Middlesex conveys such land to a purchaser for value. The testator's heir-at-law has previously conveyed the same land also to a purchaser for value. The testator's will has not been registered at the Middlesex Registry within the period allowed by law, but the conveyance by the devisee is registered before the conveyance by the heir-at-law. Which conveyance will prevail, and why?

A.—The conveyance by the devisee, being registered, first prevails: (37 & 38 Vict. c. 78, s. 8.)

Q.—State what contracts and conditions in restraint of trade are void, and in what cases such contracts and conditions may be enforced.

A.—Those in *general* restraint of trade are void, as tending to discourage industry, enterprise, and just competition. But a person may for reasonable consideration restrain himself from carrying on a trade in a particular place, or with particular persons, or for a reasonably limited time. So a person may lawfully sell a secret in his trade or business, and restrict himself from using the secret : (see *Mitchell v. Reynolds*, 1 Sm. L. C. 171 ; Sm. Man. sect. 141.)

Q.—A publican sells his business, and to induce the purchaser to give him a large price engages to discontinue as a publican. If he breaks his engagement what remedy has the purchaser?

A.—Contracts in *general* restraint of trade are void ; consequently this provision cannot be enforced by injunction, which it otherwise could be if the engagement was not to trade as such within a reasonable distance.

### LEGACIES AND DONATIONS MORTIS CAUSÂ.

*Question.*—When would a suit lie at common law to recover a legacy?

*Answer.*—When the legacy was specific and the executor had assented : (Sm. Man. sect. 206.)

Q.—What is the equitable principle upon which a legatee is entitled to sue an executor?

A.—It is upon the principle that the executor is treated as a trustee for the benefit of the legatees. Also on account of the want of any other remedy : (a) (St. Eq. § 593 ; and see 21 & 22 Vict. c. 77, s. 23 ; Sm. Man. sect. 206.)

Q.—From what time does the interest of a legacy given by a parent to his child commence?

A.—Whenever a legacy is given by a father to his child, as a provision for such child, though payable at a future day, the child has a right to the interest of the money from the testator's death : (Sm. Man. sect. 215A.)

Q.—Is a pecuniary legatee entitled to interest ; and if so, from what time, and at what rate of interest, where no time or rate of interest is mentioned in the will?

A.—The legatee is entitled to interest at 4l. per cent. from a year after the death of the testator, when no time or rate of interest is fixed by the will : (see *Alln. Wills*, 335, 3rd edit.)

Q.—In what cases will equity allow interest on a legacy, payable at a future time, when interest is not given by the will?

A.—Where the testator was the parent of, or stood *in loco parentis* to, the legatee, and there is no other provision for maintenance, even though the legacy be contingent. And when the legacy is to be paid at twenty-one, or on marriage, and the age is attained, or the marriage takes place, in the testator's lifetime, the legacy will be payable at his decease, and

(a) This latter reason is founded on the maxim "that equity will not suffer a right to be without a remedy : " (see *Smith's Man.* sect. 22.)

carry interest from that period: (Hayes & Jarm. Conc. Wills, 232-234, 6th edit.; Sm. Man. sect. 215A.)

Q.—A legacy is given to an infant “payable” at the age of twenty-one, another legacy is given to him at twenty-one. On his death before attaining that age what will become of these legacies respectively?

A.—The first legacy is a vested interest, and would go to the personal representatives; the second lapses unless interest has been given in the meantime: (*Stapleton v. Cheales*, Tudor’s L. O. 724.)

Q.—When will a person born on the 1st Jan. 1883, come of age? Give the reasons for your answer.

A.—Immediately after midnight of the 30th Dec. 1904, as the law in general allows no fraction of a day: (Co. Litt. 171 b.)

Q.—Where a legacy is charged on real and personal estate, and the legatee dies before the day of payment, how is the legacy treated?

A.—If the time of payment has respect to the *legatee personally*, and not to the *estate or convenience of the owner*, the legacy, so far as it is charged on the realty, lapses by reason of the death of the legatee before the day of payment, and the personal estate only remains charged. But it is otherwise where the legacy charged on the real estate has regard to its postponement to the estate itself, or its owner, and not to the legatee: (see Gold. Eq. 190, 191, 4th edit.; Sm. Man. sect. 213; *Parker v. Hodgson*, 4 L. T. Rep. N. S. 762.)

Q.—If a legacy is left to a person for a particular purpose which cannot be effected, what will become of the legacy?

A.—If the legacy be vested, the fact that the particular purpose cannot be effected will not divest the legacy. As if a legacy be given to a person to apprentice him, or the like, it is an absolute gift to the legatee; and if he dies before it is so applied, it belongs to his representatives: (2 St. Eq. 462, 464; Sm. Man. sect. 211.)

Q.—Define a specific and a general legacy.

A.—The former is a gift of a specified part of the testator’s property: as a gift of the diamond ring presented to me by A. B. A general legacy is not so distinguished: as a bequest of a diamond ring, which of course will be satisfied by the delivery of any diamond ring. (Alln. Wills, 313, 321, 3rd edit.; Matt. Exors. 180, 2nd edit.)

Q.—Bequest to A. of “my 1000*l.* stock of the Great Western Railway Company.” The testator afterwards borrowed 500*l.* on mortgage of the stock, and died leaving it so pledged. What are A.’s rights in relation to the legacy?

A.—The legatee is entitled to have the legacy (which is a specific one) free from the pledge: (*Bothamley v. Sherson*, 44 L. J. 489, Ch.; Williams on Executors, p. 3.)

Q.—What is the effect of the Statute of Limitations on a legacy?

A.—A legacy was barred at the end of twenty years next after a present right to receive it accrued to some person capable of giving a discharge for it, unless in the meantime some part of the legacy or interest thereon has been paid, or some written acknowledgment of the right thereto given. And only six years’ arrears of interest on the legacy can

be recovered: (see 3 & 4 Will. 4, c. 27; Sug. R. P. Stats. 116, 131.) Since the 1st of January, 1879, the time is reduced to twelve years: (37 & 38 Vict. c. 57, s. 8.) A legacy given upon trust is exempt from this rule (*Watson v. Saul*, 1 Giff. 188); but if charged upon land is no longer so: (*Ib.* sect. 10.)

**Q.**—Define the principles which guide equity in the construction of wills and legacies.

**A.**—In deciding on the validity and interpretation of purely personal bequests, equity implicitly follows the rules of the civil law as formerly recognised in the ecclesiastical courts, but as to the validity of devises and legacies charged on land, it generally follows the rules of the common law: (Sm. Man. sect. 217.) And all courts, as far as possible, in the construction of wills, are guided by, and try to carry out, the intention of the testator.

**Q.**—Define *donatio mortis causâ*, and state in what particulars it differs from, and in what it resembles, a legacy.

**A.**—A *donatio mortis causâ* is a gift of personal property made by one who is in peril of death, evidenced by a manual delivery of the property itself, or the means of obtaining possession of it, and conditioned to take effect in the event of his not recovering from his existing disorder, and not revoking the gift before his death.

It differs from a legacy thus: 1. It takes effect *sub modo* from the delivery in the donor's lifetime, and cannot, therefore, be proved as a testamentary act in the Probate Division. 2. It requires no assent of the executor or administrator to perfect the donee's title. It differs from a gift *inter vivos*, and resembles a legacy in these particulars: (1) It is revocable during the donor's lifetime. (2) It may be made to the wife of the donor. (3) It is liable for the donor's debts on a deficiency of assets. (4) It is liable to legacy duty: (see Sm. Man. sect. 221; *Ward v. Turner*, 1 L. C. Eq. 721, 2nd edit.; Wms. P. P. 368, 10th edit.)

**Q.**—Can a good *donatio mortis causâ* be made by delivery of a cheque? of a bond? of a bankers' deposit note? or of a railway share certificate?

**A.**—Cheques, bonds, and bankers' deposit notes (*Amiss v. Witt*, 33 Beav. 649) may be the subject of it: (Sm. Man. sect. 220.) But see the case of *Hewitt v. Kaye* (L. Rep. 6 Eq. 198), where a cheque which could not be presented before the donor's death was held not a good *donatio mortis causâ*. A railway share certificate cannot be the subject of it: (*Moore v. Moore*, L. Rep. 18 Eq. 474.)

## TRUSTS, TRUSTEES, &c.

### 1. *Express Trusts.*

**Question.**—Define a trust.

**Answer.**—A trust, when used in the sense of an interest, is the equitable or beneficial interest in or ownership of real or personal estate, unattended with the possessory and legal ownership: (see Sm. Man. 118, 10th edit.)



Q.—State the different kinds of trusts recognised in equity; and in what respect the legal differs from the equitable interest in the subject-matter of the trust.

A.—Trusts are either express, implied, or constructive. The person who has the legal interest in the subject-matter of the trust holds the direct and absolute dominion over the property in the view of the law; whilst he who has the equitable interest (called the *cestui que trust*) is entitled to the income and profits, or beneficial interest in the property: (St. Eq, § 964; Sm. Man. sect. 226.)

Q.—Define (a) an express trust, (b) an implied, trust, and (c) a constructive trust. Give an illustration in each case.

A.—(a) An express trust is one which is clearly expressed by the author thereof, or may fairly be collected from a written document, as a devise to A. and his heirs upon trust to pay B. the rents and profits for life, and then upon trust for his children, as he should appoint: (Sm. Man. sect. 227.)

(b) An implied trust is one founded upon an unexpressed but presumable intention of the parties, as where real estate is devised upon trust for sale for a statutory purpose, which fails, there will be a resulting trust to the heir: (*Ib.* sect. 282.)

(c) A constructive trust is one raised by construction of equity in order to satisfy the demands of justice without reference to any presumable intention of the parties, as where a joint owner, acting *bonâ fide*, presumably benefits an estate by repairs or improvements, it arises in respect of the sum expended: (*Ib.* sect. 322.)

Q.—Give some instances of the difference between a legal and equitable estate.

A.—The following may be mentioned: The owner of the legal estate could enforce his right at law, whereas the owner of the equitable estate could only do so in equity. The legal estate in land can only be transferred by deed or will, whereas any writing is sufficient in equity to bind the equitable estate. Legal assets are distributable according to legal priorities, whilst equitable assets are distributable *pari passu*. The enforcement of trusts is confined to the Chancery Division of the High Court: (1873 Act, s. 34; sub-s. 3.)

Q.—How far will equity construe words of recommendation or request as creating a trust by implication?

A.—If the object and subject of the proposed trust are definite, and it can be gathered from the will, and the previous conduct of the testator, that the expressions appear to be imperative, words of recommendation or request create a trust: (Sm. Man. sect. 233.)

Q.—Define trusts executed and trusts executory; and state if there is any, and what, difference in their construction?

A.—Trusts executed are those which are formally and finally declared by the instrument creating them. A trust executory is one raised by a stipulation or direction to make a settlement upon trusts which do not appear to be formally and finally declared by the instrument creating them. Trusts executed are construed in the same manner as similar limitations of legal estates and interests were construed in courts of law. Trusts

executory are not construed so strictly as the former, but more according to the presumable intention of the party creating, if construing them strictly would render the settlor's directions to settle nugatory: (see Sm. Man. sect. 236; *Lord Glenorchy v. Bosville*, 1 L. O. Eq. 1, 2nd edit.)

Q.—What trusts will equity enforce, and what trusts will it not enforce?

A.—Equity will enforce a trust where it is executed, or where it is raised by will, although it be a voluntary trust; but it will not enforce a mere voluntary *executory* trust raised by a covenant or agreement, unless for valuable consideration: (see St. Eq. §§ 793, 793 a; Sm. Man. sect. 245.)

Q.—If a man conveys an estate to trustees upon trust to sell and pay his debts, will equity, in an action by a creditor, compel the performance of the trust?

A.—If the conveyance is not communicated to, or the creditors are not in any manner privy to the conveyance, the deed merely operates as a power to the trustees, and is revocable by the debtor. But if the creditors have notice of the trust, and assent to it, it seems that equity will enforce the performance of the trust: (see *Acton v. Woodgate*, 2 Myl. & K. 492; Sm. Man. sect. 250.)

Q.—A man might be owner of a thing in equity when another man was owner at law. What is the meaning of the equitable ownership; how does it operate, and how does equity give effect to it?

A.—This question is illustrated by the ordinary case of trustee and *cestui que trust*. At law the trustee was absolute owner, the existence of the *cestui que trust* not being recognised; but in equity he was and is the real or beneficial owner. If the trustee refuses to perform his trust equity will, by acting *in personam*, compel him to perform his duties and pay over the profits of the estate to the *cestui que trust* or equitable owner: (see Sm. Man., sect. 389 *et seq.*; Haynes' Eq. 23, 96, 122, 129, *et infra.*)

Q.—What is the distinction between a *cestui que vie* and a *cestui que trust*?

A.—A *cestui que vie* is he on the duration of whose life the interest of another depends—*e.g.*, an estate to A. during the life of B., here B. would be termed the *cestui que vie*; while a *cestui que trust* is the person having himself the equitable or beneficial interest, the legal estate being held for him by the trustee.

Q.—Why and how did the Statute of Uses fail to accomplish its intended object; and what bearing had its failure on the modern jurisdiction of the Court of Chancery?

A.—It failed to do so, because it was held that the Statute of Uses (27 Hen. 8, c. 10) only executed the first use, and that if a use was limited or engrafted upon a use, the statute did not execute the latter use, but that it remained a trust to be enforced in equity only. Thus arose the modern doctrine of uses and trusts: (*Tyrrell's case*, Tud. L. O. C. 251; Sm. Man. sect. 231.)

Q.—Will equity recognise any period of time as a limitation to a suit

against a trustee who is charged with fraud in the execution of his trust, and is there practically any, and what, distinction to the rule?

A.—Lapse of time is no bar to the claim of the *cestui que trust* against his trustee who has been guilty of fraud, and the *cestui que trust* is, without his default, in ignorance of that fraud. And this rule applies whether the trust be an actual or only a constructive trust: (*Rolfe v. Gregory*, 12 L. T. Rep. N. S. 162, L. C.) Where there has been no fraud, however, it is presumed an express trust must still exist to constitute lapse of time no bar: (see Sm. Man. sect. 268; *Rolfe v. Gregory*, *sup.*, and 1873 Act, s. 25, sub-s. 2; 37 & 38 Vict. c. 57, s. 10.) So, long acquiescence in the trustees' misconduct may bar the *cestui que trust*: (Sm. *sup.*)

## 2. Implied Trusts.

Q.—What is an implied trust?

A.—One founded on an unexpressed but presumable intention: (Sm. Man. tit. 2, Ch. 5.)

Q.—What is a resulting trust? Give an instance.

A.—It is one returning by implication for the benefit of the settlor or his representatives, either from the want of consideration or failure of the objects of the trusts, or the indefinite nature of or want of trusts. As where A. conveys land to B., without consideration and without any uses or trusts being declared: (Cruise, Uses, 194, St. Eq. § 1196 *et seq.*, and see *post.*)

Q.—When property is given upon trusts which fail either in the whole, or partially, by deaths, or by illegality, or indefiniteness of the trusts themselves, or when they are finally fulfilled without exhausting the property, to whom does the resulting trust of such remaining property belong?

A.—There is a resulting trust of such property, or of so much thereof as remains unexhausted, to the person creating the trust, or to his heir or legal personal representatives, unless there is sufficient evidence or presumption of a contrary intention: (Sm. Man. sect. 295; St. Eq. § 1196 a, and note; *Ackroyd v. Smithson*, 1 L. C. Eq. 783, 3rd edit.)

Q.—State shortly the principle on which the leading case of *Ackroyd v. Smithson* was decided.

A.—The principle is that the heir must take all real estate which is not effectively disposed of by the will. The next of kin can take by intestacy no interest in the real estate. And, therefore, if real estate is by the will directed to be sold, and any part of the proceeds be undisposed of, there being an intestacy as to such part of the proceeds, it must result to the heir.

Q.—What is conversion, and who are entitled to enforce it? Can a trustee who happens to be beneficially entitled to the property elect to take it in either character, and, if so, upon whom does the *onus probandi* fall of showing the same?

A.—It is a maxim that equity looks upon that as done which ought to be done; thus money directed to be laid out in land, and land directed to be turned into money, are in general regarded as that species of

property into which they are directed to be converted. The persons to whom property directed to be converted is limited, and those who stand in their place are entitled to enforce the conversion. The trustee, being absolutely entitled to the property, may as owner take it in either character, but until an election is made the property passes as if actually converted, and the onus lies on those who would show an election to take it in another character than that it would have if converted: (Sm. Man., sects. 41-47.)

*Q.*—A. becomes absolutely entitled to a sum of 1000*l.* in court, being money directed by a settlement to be laid out in the purchase of land, and subsequently dies intestate. The money is claimed by A.'s heir-at-law, and also by his administrator. On what does the title to the money depend?

*A.*—A.'s heir-at-law will be entitled to the money, unless A. in his lifetime had elected to take it as personalty: (Sn. Eq. 206, 4th edit.)

*Q.*—Where a conveyance or transfer of property, real or personal, is made without consideration, but upon trust, of which no distinct use or trust is stated, to whom, then, will the implied trust devolve?

*A.*—In this case there will be a resulting trust to the use of the grantor or his representatives, real or personal, as the case may require: (St. Eq. § 1197.)

*Q.*—Land is directed to be sold. Money is directed to be laid out in land. How does this affect the devolution of the properties, and when does the conversion take place?

*A.*—The land is reputed as money, and will pass as such, and the money is considered as land, and descendible and devisable as such. For equity looks upon that as done which is agreed to be done. If the direction is by deed, the conversion will take effect from the date of the deed; if by will, from the death of the testator: (Sm. Man. sect. 42, &c.)

*Q.*—Given in a will the ordinary trusts for conversion and investment, and bequest of the income to the testator's widow for her life, on what principles does the court act in dealing in the meantime with the income arising from the profits of the testator's business (say a brewer) coming within those trusts?

*A.*—The widow would be entitled until conversion to sums equal to the dividends which, had the testator's estate been converted and invested in Consols at the end of a year from his death, the estate would have received from the Consols: (*Brown v. Gellatly*, New Rep. 2 Ch. App. 751.)

*Q.*—Devise of land in trust for sale to pay debts. After the payment of debts in full there is a surplus. Who is entitled to it?

*A.*—The heir-at-law of the testator is entitled to the surplus. For where real estate is directed to be sold for certain purposes, so much of the estate or its produce as is not effectually disposed of by the will results to the heir. There is here no out-and-out conversion, but only for the purpose of paying debts: (Sm. Man. sect. 295.)

*Q.*—If money is directed by a testator to be laid out in land for

particular purposes, and these purposes should fail of taking effect, does it belong to the heir or next of kin?

A.—It belongs to the next of kin; for where the purpose fails the intention to convert fails also. But if any event has happened on which the conversion ought to take place, though the object of the conversion afterwards ceases to exist, the property will be treated as if converted: (Sm. Man. sect. 300.)

Q.—A testator directs his trustees to lay out his residuary personal estate in land, in which he gives a life estate to his wife, with remainder to a charity. The testator's heir-at-law and next of kin die in the lifetime of the widow. The residue having been ascertained but the investment in land never having been made, upon whom will the money devolve at the widow's death, and why?

A.—In the somewhat similar case of *Cogan v. Stevens* (5 L. J. N. S. 17, Ch.), Lord Cottenham decided that the money fell into the residue of the personalty. The personal representative of the next of kin will, therefore, be entitled to it, and as personalty: (see *Reynolds v. Godlee*, Johnson, 536; Haynes' Out., p. 40, 4th edit.)

Q.—A testator devises all his real estate to trustees upon trust to sell and divide the proceeds of sale equally between A. and B. Both A. and B. die in the testator's lifetime. Does the land go to the heir-at-law or to the personal representatives of the testator?

A.—When both die the trust for conversion fails altogether. The land will therefore go to the testator's heir as real estate: (Haynes' Eq., p. 396, 3rd edit.)

Q.—A. purchases and pays for a freehold estate, which is conveyed by the vendor to B. C. purchases and pays for Government stock, which is transferred into the name of D. Is there a resulting trust in both or either of these cases in favour of A. or C. upon simple proof of the payment of the purchase money by him? (a)

A.—The trust of the legal estate in the freehold results to A.; although B. executes no declaration of trust. But, unless the trust arises on the face of the deed itself, the proofs must be very clear; and it seems doubtful whether parol evidence is admissible against the answer of the trustee (B.) denying the trust: (Sug. Conc. V. 556.)

There is also a resulting trust of the stock in favour of C., and a parol declaration is admissible as evidence of the intention of the party advancing the money, this being a trust of personalty which was never within the Statute of Frauds, or the doctrine of resulting trusts under the statute: (see 1 Myl. & K. 506; *Sidmouth v. Sidmouth*, 2 Beav. 454; also Sm. Man. sect. 312.)

Q.—A. purchases an estate and takes a conveyance of it in the name of C., his son. Is there a resulting trust to A.?

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(a) Also asked thus: If a person purchases lands or securities in the name of another, being a stranger, what is the trust that is implied, and how can it be enforced?

It may be mentioned that this does not apply against the policy of any statute, as where the buyer of a British ship has it registered in the name of another; for registration was conclusive of ownership both at law and in equity.

A.—If the child is unprovided for, in general there will be no resulting trust, because it will be presumed that it was intended as a provision for the child; unless there are circumstances which show a contrary intention—such as a contemporaneous declaration that he should take as a trustee: (Sm. Man. sect. 313; *Dyer v. Dyer*, 1 L. C. Eq. 184, 3rd edit.)

### 3. Constructive Trusts.

Q.—Define a constructive trust as distinguished from express or implied trusts, and state some of the instances in which it arises.

A.—It is one raised by construction of equity in order to satisfy the demands of justice, without reference to any intention of the parties. It arises where a person who is only joint owner, acting *bonâ fide*, permanently benefits an estate by repairs or improvements in respect of the sum expended. So where a person lawfully in possession under a defective title has made permanent improvements, if relief is asked by the true owner, equity will compel him to allow for such improvements; for he who seeks equity must do equity: (Sm. Man. sect. 322; *Keech v. Sandford*, 1 L. C. Eq. 36, 2nd edit.)

Q.—What do you understand by the following expressions?

- (a) A constructive trustee.
- (b) Constructive notice.
- (c) An interim injunction, with the usual undertaking in damages.
- (d) A stop order.

A.—(a) A person whom equity would consider a trustee by reason of the nature of his dealings with the property, and not by reason of any express declaration of trust; *e.g.*, a man who has obtained in his own name a new lease of property whereof he was tenant for life.

(b) Constructive notice is defined by Lord Chelmsford in *Espin v. Pemberton*, 3 D. & H. 554, as the knowledge which the courts impute to a person upon a presumption so strong of the existence of the knowledge that it cannot be allowed to be rebutted.

(c) An interim injunction is one granted till the next motion day or hearing of the cause, when the party obtaining the injunction is required to undertake that if it should ultimately prove that the injunction ought not to have been granted, he will abide by any order the court may make as to damages.

(d) An order preventing the transfer or dealing with funds in court, without notice to the person obtaining the order.

Q.—What lien has a vendor on the estate after conveyance for his unpaid purchase money, and how is such lien affected if the vendor take a separate security for such unpaid purchase money?

A.—The vendor had in equity, but not at law, a lien on the land so sold for the purchase money. If he takes a distinct and independent security for the purchase money, his lien on the estate is gone; as where he accepts a mortgage of another estate for the purchase money, or even a mortgage of the estate sold for only *part* of the purchase money. But taking a bond or note will not affect his lien: (see Sug. Conc. V. 528, 529, 533; *Macreth v. Symmons*, 1 L. C. Eq. 235, 2nd edit.; Sm. Man. sect. 327.)



Q.—In what cases does a vendor's lien for unpaid purchase money prevail against third parties claiming the estate through the vendee?

A.—Where the third party who claims the estate through the vendee has notice of the vendor's lien, such lien for the unpaid purchase money, together with interest thereon at 4l. per cent., will still continue, and as against a purchaser without notice who has not the legal estate, where the vendor has not been guilty of contributory negligence: (see Wms. R. P. 434, 13th edit. ; Sm. Man. sect. 330.)

Q.—If a trustee of renewable leaseholds renews the lease in his own name and for his own benefit, what view of the transaction will the court take when the matter comes before it?

A.—He will be declared a trustee of the renewed interest for his *cestui que trust*, even though the lessor may have refused to grant a renewal to the *cestui que trust*; (Sm. Man. sect. 334; St. Eq. § 1211; *Keech v. Sandford*, 1 L. O. Eq. 36, 2nd edit.)

Q.—A trustee of a lease, on the refusal of the lessor to grant a new lease to the *cestui que trust*, obtains a renewal in his own name. For whose benefit does the renewal enure? What is the ground for so holding? If the lease comprises the old and some additional land what is the result?

A.—In the first case see last answer.

In the latter case it was held, in *Acheson v. Fair* (3 Dru. & W. 512), that the trustee might hold the additional land for his own benefit.

Q.—Where leaseholds for years or for lives are settled upon several persons in succession, what is the rule as to the apportionment of the charges for the renewal of the same?

A.—When there is no declaration of intention by the settlor out of what fund the expenses are to be levied, the following principles have been laid down: If either the tenant for life or remainderman pays the fine an apportionment will be compelled between the tenant for life's estate and the remainderman at the tenant for life's decease, and either party advancing the fine will have a lien on the renewed lease for the amount expended beyond his proportional part, the principle as to apportionment being that the tenant for life will be bound to pay the interest on the fine, together with a due proportion of the principal according to the benefit he derives from the renewed interest. In the case of leases for lives the apportionment is regulated according to the chance of benefit to the tenant for life and remainderman at the time of renewal: (Lewin on Trusts, 7th edit. p. 340; *Nightingale v. Lawson*, 1 B. C. O. 440; *Reeves v. Creswick*, 3 Y. & O. 715.)

#### 4. Trustees, Executors, &c.

Q.—When a trustee who has been appointed by deed, and has accepted the trust, refuses to act, what is the proper course to be pursued to obtain an execution of the trust?

A.—The *cestui que trust* may, by action in the Chancery Division, compel the trustee to perform the duties incident to that character; for, having once acted, he cannot discharge himself of the obligation without

the consent of the *cestui que trust* or of the court : (Gold. Eq. 197, 4th edit. ; Sm. Man. sect. 344.)

Q.—If a person has been appointed a trustee without his consent, and has not acted, and is not desirous to act, and a writ is issued against him, what defence should he make ?

A.—He must disclaim : (see Gold. *ubi sup.*)

Q.—What remedy will equity give in a case where a trustee has been named, but has never acted or accepted the trust, and refuses to do so ?

A.—It will appoint a new trustee and make a vesting order vesting the trust estate in him : (13 & 14 Vict. c. 60.)

Q.—If a person be nominated a trustee in a will, and also take a benefit under it, can he claim the testator's bounty and yet disclaim the onus of the trust ?

A.—He may do so unless the benefit be annexed to his office as trustee : (*Warren v. Rudall*, 1 J. & H. 1 ; *Lewis v. Matthews*, 8 Eq. 277.)

Q.—By what acts of a person named as a trustee will he be deemed to have accepted the trust ? And in what ways may a trustee after acceptance divest himself of the trust ?

A.—By an act and interference with the property, which can only be imputed to his being a trustee, for after accepting the trust he can only cease to be a trustee by death or by obtaining the appointment of a new trustee in his place, or by being discharged of all his *cestuis que trustent* : (Lewin on Trusts, Ch. 22.)

Q.—Explain the meaning of the maxim that equity will not allow a trust to fail for want of a trustee. Give an instance of its application.

A.—Whenever a perfect trust or even an imperfect trust, if supported by a valuable consideration, has once attached, and is not extinguished by the countervailing equity of a *bonâ fide* purchaser for valuable consideration without notice or other conflicting equity, the court will follow the legal estate, and decree the person in whom it is vested to execute the trust : (Sn. Eq. 143, 4th edit.) As if prior to the Married Women's Property Act, 1882, property was given to the separate use of a married woman and no trustees were interposed, equity converts the husband into a trustee for her : (*Bennet v. Davies*, 2 P. Wms. 316.)

Q.—Can a trustee delegate a power to give receipts ?

A.—No ; the maxim being "*Delegatus non potest delegare*" (1 Sug. Pow. 221, 6th edit. ; *Viney v. Chaplin*, 31 L. T. Rep. 142) ; and every trustee who has accepted the trust must join in the receipts : (see Sug. Conc. V. 516-527.)

Q.—In the absence of the usual receipt clause, when can a purchaser now pay his purchase money without being bound to see to its application ?

A.—In all cases now where the payment is *bonâ fide*, unless the contrary shall be expressly declared by the instrument creating the trust or security : (see 22 & 23 Vict. c. 35, s. 23 ; 23 & 24 Vict. c. 145 ; 44 & 45 Vict. c. 41, s. 36.)

Q.—A testator by his will gives his real and personal estate to trustees

upon trusts for sale and conversion to pay certain life annuities, and, subject thereto, has given the residue to your client, who doubts the responsibility of the trustees, and is desirous to take the most effectual measures for securing the trust funds. State the advice which you would give under these circumstances, and the general course of proceeding to be instituted.

A.—I should advise the client to issue a writ in the Chancery Division, and have the estate administered under the direction of the court. The proceedings up to the trial would be the same as in ordinary suits; the judgment made will, however, be preliminary, and direct the chief clerk to sell the property, if not already sold, and to inquire what amount should be set apart to answer or purchase the annuities. When this is done, the chief clerk makes his certificate, which must be signed, approved, and filed. The cause should then be set down on further consideration, and a final judgment made, ordering the residue, after satisfying the annuities and payment of costs, to be paid over to the client. Both the preliminary and final judgment must be drawn up, passed, and entered in the usual way: (see Ayck. Pr. 9th edit. ; *et infra*.)

Q.—It is admitted by a defendant trustee that there is a large sum of money belonging to the trust fund in his hands; what course would you advise to be adopted by the plaintiff who is interested in the fund?

A.—That an order for payment of the trust funds into court be obtained. The order is usually obtained on motion, notice of which must be served on the trustee. An affidavit of service should be filed, and an office copy procured. The motion is made by counsel to the court. If the order is obtained, it is drawn up, passed, and entered in the usual way, and served on the trustee: (Ayck. Pr. 445, 9th edit.) But these orders are now commonly made at chambers.

Q.—When two or more trustees appeared in suit by one solicitor, can they afterwards sever their defence and have separate bills of costs? State the rule in this respect that now prevails.

A.—As a general rule trustees are not justified in severing in their defence, and if they do so they will not be allowed more than one set of costs, without some special reason: (*Course v. Humphrey*, 32 L. T. Rep. N. S. 329; Ayck. Pr. 605, 9th edit.)

Q.—Can a party to a suit bid at a sale by auction under a judgment of the court? Can a receiver do so?

A.—A party to a suit cannot bid at the sale without the authority of the court, and it will not give a receiver liberty to do so: (Ayck. Pr. 519, 9th edit. ; Sug. Conc. V. 52, 543, &c.)

Q.—The Court of Chancery prohibited persons filling certain characters from becoming purchasers; name the principal of such characters, and the ground upon which the prohibition was founded.

A.—Generally speaking, trustees who have accepted the trust, agents, registrars and trustees of bankrupts, solicitors, auctioneers, creditors who have been consulted on the mode of sale, counsel, or any person who, by being employed or concerned in the affairs of another, has acquired a knowledge of his property, are incapable of purchasing such property. — if persons having a confidential character were permitted to avail

themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity : (Sug. Conc. V. 543, 544 ; St. Eq. § 322.)

*Q.*—When a trustee invests part of the trust property on a security not within his authority and makes a profit, and in other like investments sustains a loss, how is the account to be taken ?

*A.*—Against the trustee ; the profit will belong to the *cestui que trust*, for it is a constructive fraud upon the latter to employ the property contrary to the trust. But if any loss should arise in consequence of a violation of the trust, the trustee will be liable to make good the deficiency. He cannot set off the profit against the loss : (Sm. Man. sect. 358, &c.)

*Q.*—What are the rights of beneficiaries against a trustee who has traded with the trust moneys, but subsequently replaced them in proper investments ?

*A.*—The trustee, at the option of the *cestui que trust*, is liable, where he has an option of investments, for the principal and interest, until invested in compliance with the trust ; or, where he has no option, with the sum that would have arisen therefrom if invested ; or, where he has traded successfully, the *cestui que trust* may make him accountable for the profits : (see Roberts' Eq. 184, 3rd edit.)

*Q.*—If a trustee were to consult you as to the propriety of investing part of the trust funds upon a *second* mortgage, what advice would you give him, and what reasons would you adduce in support of your advice ?

*A.*—I should advise him that a second mortgage was not a proper investment ; for he would neither obtain the title-deeds nor the legal estate in the property ; and if he foreclosed he would have to do so subject to the first mortgage, or pay it off. Again, he might possibly be foreclosed or postponed by a right of tacking being exercised. And if there was any loss he would have to make it good : (Sm. Man. tit. 2, c. 7.)

*Q.*—Are trustees, as such, entitled to any, and what, allowance for expenses or loss of time, or either of them ?

*A.*—They are not allowed any remuneration for their services without some provision for that purpose. But trustees are entitled without any express provision to defray out of the trust funds expenses legitimately and properly incurred : (Sm. Man. sect. 345 ; *Robinson v. Pett*, 2 L. C. Eq., 2nd edit.)

*Q.*—Name the exceptions to the established rule that a trustee or executor shall have no allowance for his care and trouble.

*A.*—He may have such an allowance when it is given him by the instrument appointing him trustee or executor, and trustees of West Indian Estates and executors administering in the East Indies are allowed a commission : (see Lewin on Trusts, chap. 21, sect. 1.)

*Q.*—State the principle upon which the Statute of Limitations cannot be pleaded by a trustee in bar to the claim of his *cestui que trust*.

*A.*—Upon the principle that time will not run against an express trust : (see St. Eq. § 1520 ; 1873 Act, s. 25, sub-s. 2.)

**Q.**—Is a lapse of time a bar in cases of charitable trusts?

**A.**—It is not : (Sm. Man. sect. 278.)

**Q.**—A party entitled to a fund in the hands of trustees executes an assignment of it by way of security for money borrowed ; is anything, and what, besides the assignment, necessary for the effectual security of the lender ?

**A.**—Yes ; the trustees should first be asked if they have had notice of any previous sale or charge. As soon as the assignment is executed notice must be given to the trustee ; for in all assignments of equitable interests, other than equitable estates, he who gives notice to the holder of the fund has priority over him who does not : (see St. Eq. § 1047, &c.)

**Q.**—If a trustee pays money under a power of attorney from a person who, at the time of payment, was dead, or had revoked the power, will the trustee under any, and if any what, circumstances be liable to repay the money ?

**A.**—A trustee, executor, or administrator, making any payment or doing any act *bonâ fide* and without notice, in pursuance of a power of attorney, is not liable for the moneys so paid or the act so done, if the person who gave the power was dead at the time of the payment or act, or has avoided the power : (22 & 23 Vict. c. 35, s. 26.) In cases not within this Act the trustee is liable, if the person to whom the money is paid is not compelled to refund it : (Langley's Notes to the Act ; and see 44 & 45 Vict. c. 41, s. 47, which protects all persons for payments made and Acts done after 31st December, 1881.)

**Q.**—Trustees of a settlement, made previous to the marriage of John with Sarah, have power to sell real estate with the consent of John and Sarah during their joint lives, or with the consent of John during his life if he should survive Sarah. John dies in the lifetime of Sarah. Can the trustees exercise the power ?

**A.**—The trustees cannot exercise the power because the death of John destroyed the power : (Sug. Pow. 319, 7th edit.)

**Q.**—What construction does the court put upon the word "survivor" in a will ? Is it ever construed to mean "other," and, if so, under what circumstances ? Point out the distinctive force of the word "other" in the expression "survivor or other of them."

**A.**—The word "survivor" when unexplained by the context of the will, is construed according to its literal meaning. But in the case of a limitation over to the "survivor" of a class of legatees, it is construed to mean "other" where it was apparently the intention of the testator that the other should take, without reference to the contingency of his or her surviving the person from whom the property is to go over : (2 Sm. Comp. 999, 4th edit.)

The force of the word "other" when used in connection with "survivor," will, of course, forbid confining the bequest to those who literally survive, and let in the representatives of the deceased : (2 Jarm. Wills, 651, n (j), 3rd edit. ; *Slade v. Parr*, 7 Jur. 102.)

**Q.**—If a trustee or executor, who is an accounting party, be about to go abroad out of the jurisdiction of the court, will equity interpose and

compel him to give security, and, if so, what proceedings should be taken to obtain the same?

A.—Equity will so interfere by writ of *ne exeat regno*. To obtain it a writ must be issued and the claim verified by affidavit, upon which counsel moves the court, and if the order is granted it is drawn up, passed, and entered in the usual way. The writ is then prepared and sealed. It is directed to the sheriff and executed by his officer: (Evans' Ch. Pr. 106; St. Eq. §§ 1471, 1473; and see *Sichel v. Raphael*, 4 L. T. Rep. N. S. 114.)

Q.—Was there any, and if any what, difference between the rule of law and the rule of equity, with respect to a debt due from an executor to a testator, whose will appoints him executor?

A.—Yes; at law the debt was extinguished, for it could only be recovered by action, and the executor could not sue himself, and when the remedy is suspended by the voluntary act of the creditor, it is for ever gone. But in equity the executor was a trustee for the benefit of the testator's estate: (Matt. Exors. 192, 2nd edit.)

Q.—A testator bequeaths to A. the sum of 1000*l.*, owing to him by B., and appoints B. his sole executor, who proves the will. Does A.'s legacy fail, or has he any, and if any what, means of obtaining the 1000*l.*?

A.—Although a debt due from an executor was formerly extinguished in law, yet in equity the executor was held a trustee for the benefit of the testator's estate: (Matt. Exors. 192, 2nd edit.) A. should administer the deceased's estate if the executor makes any difficulty in paying the legacy.

Q.—If a trustee for sale purchases the trust property for its full value in the name of another person, and pays the purchase money to the parties entitled to it, and afterwards expends money in permanently improving the property, can the sale be set aside, and if so, when and at whose instance, and upon what terms?

A.—The sale may be set aside on the application of the *cestui que trust*, before he has lost the right by long acquiescence, on his repaying to the trustees the original price of the estate and all sums he has laid out for permanent benefit and improvement on the estate and interest thereon from the time they were paid, and the trustee must account for all sums received by him connected with the estate: (Sug. Conc. V. 549.)

Q.—In a case where a sole surviving trustee, who has alone under the settlement power to appoint a new trustee, refuses or has become incapable to act, describe the course proper to be adopted in order: 1. To appoint a new trustee of the real and personal estate according to the trusts of the settlement. 2. To transfer the settled realty and personalty to the new trustees.

A.—The *cestui que trust* should present a petition to the Chancery Division of the High Court under the Trustees Act, 1850, intituled in the Act and in the matter of the trust, and when the judge's fiat is obtained, a copy of the petition and fiat must be served on the old trustee, or, if lunatic, on his committee. The petition must be supported by evidence of the fitness of the new trustees, and of their written consent, and service of the petition two clear days before the hearing. The court



may then make the order appointing the new trustees, and by the same or a subsequent order effectually vest the trust property in them or direct a person to convey to them: (13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55; Ayck. Pr. 610, 9th edit.)

*Q.*—State the various modes by which, and the persons by whom or on whose application, new trustees or a new trustee of a deed or will may be appointed.

*A.*—They may be appointed by the parties named and in the manner specified in the instrument creating the trust, or, if necessary, the *cestui que trust* may present a petition under 13 & 14 Vict. c. 60, when the court (Chancery Division) will appoint new trustees.

By 44 & 45 Vict. c. 41, if necessary, the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, by writing may appoint any other person or persons to be a trustee or trustees in the place of any trustee dead, remaining out of the United Kingdom, desiring to be discharged, or refusing or being unfit or incapable to act.

*Q.*—Suppose a trust estate to devolve upon an infant, how is such infant to convey for the purposes of the trust?

*A.*—The court will (on petition) make an order vesting the lands in such person or persons, and in such manner and for such estate as the court directs; and the order has the same effect as if the infant had been twenty-one years of age, and had duly executed a conveyance or assignment of the land in the same manner and for the same estate. Or, if more convenient, a person may be appointed to convey: (13 & 14 Vict. c. 60, ss. 7, 20.)

*Q.*—What relief does equity give when a trustee cannot be found?

*A.*—The court may make a similar order as in the case of infant trustees: (see sect. 9, *Ib.*) Or, if stock be standing in the name of such trustee, an order to transfer the same or to receive the dividends or income thereof, or to sue and recover *choses in action*, &c., may be made: (sect. 22.) Or the court may appoint new trustees: (sect. 32.)

*Q.*—If a trustee becomes lunatic, what relief can the *cestui que trust* obtain?

*A.*—The Lord Chancellor, being entrusted with the care of the persons and estates of lunatics, may, on petition, make similar orders, or appoint new trustees as above detailed: (see sects. 3, 5, 32, *Ib.*)

*Q.*—If a trustee having stock vested in him becomes a lunatic, and a new trustee is appointed, how is the transfer of the stock from the lunatic to the new trustee to be made?

*A.*—The Lord Chancellor may, on petition, make an order vesting the right to transfer any such stock, or to receive the dividends and income thereof, in any person he may appoint: (sect. 5, *Ib.*) The person in whom this right is vested is thereby authorised to execute deeds and powers of attorney, and perform all acts relating to the transfer of such stock into his or their names, or otherwise, or relating to the receipt of the dividends thereof, to the extent and in conformity with the terms of such order: (see sect. 26.)

**Q.**—Can the court interfere if the trustees be also beneficially interested in the fund ?

**A.**—Yes ; the court may interfere, although the trustee has some beneficial interest in the subject of the trust : (see sect. 2, *Ib.*)

**Q.**—A settlement, dated in 1861, authorises the trustees to invest the trust funds in Government or real securities in England ; may the trustees invest the trust fund in any other, and what countries, and by virtue of what authority ? Is there any difference if the settlement be dated in 1840 ? (*a*)

**A.**—By the 22 & 23 Vict. c. 35, it is provided that trustees, &c., may (unless expressly forbidden by the instrument creating the trust) invest the trust fund in real securities in any part of the United Kingdom, or in the Stock of the Bank of England or Ireland, or in East Indian Stock : (sect. 32.) It was held that this section only applied to instruments made after the Act came into operation, viz., 13th August, 1859 : (see *Re Miles's Will*, 1 L. T. Rep. N. S. 122.) By the 23 & 24 Vict. c. 38, however, this section is made to operate retrospectively : (sect. 12.)

And by an order made to carry out the 10th and 11th sections of the 23 & 24 Vict. c. 38, it is ordered that cash under the control of the court may be invested in Bank Stock, East India Stock, Exchequer Bills, and Two-and-a-half per Cent. Annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales ; as well as in Consolidated Three per Cent. Annuities, Reduced Three per Cent. Annuities, and New Three per Cent. Annuities : (see Order, 1st February, 1861.) Also in new East India Stock, and any securities the interest of which is guaranteed by Parliament : (30 & 31 Vict. c. 132.) And in Consolidated Stock of the Metropolitan Board : (34 & 35 Vict. c. 47, s. 13.)

**Q.**—In or upon what stocks, funds, or securities may cash, under the control of the court, be now invested ; and upon whom must a petition for conversion of Bank Three per Cent. Annuities, into any of such stocks, funds, or securities, be served ?

**A.**—Cash under the control of the court may be invested in the stocks, &c., mentioned in the order of 1st February, 1861, set out *supra*. The petition for conversion of any Three per Cent. Bank Annuities into any other of the stocks, funds, or securities before mentioned, is to be served upon the trustees, if any, of such Bank Three per Cents., and upon such other persons, if any, as the court orders : (Order 1st February, 1861 ; *Ayck. Pr.* 476, 9th edit.)

**Q.**—What investments are included by the terms “ Government or Real securities ” ?

**A.**—Government securities, as distinguished from stocks and funds, seem to be nothing else than Exchequer Bills, in which trustees appear to be justified, even without express authority, in investing the property for any temporary purpose, as during the necessary delay in completing a contemplated mortgage security. But where a permanent investment is intended, a trust to lay out money in Government securities will not authorise the purchase of Exchequer bills. Real security means the

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(*a*) A similar question has been asked in the Conveyancing Division.

mortgage of real estate, namely, freehold or copyhold hereditaments of sufficient value, but not leasehold: (see Wms. P. P. 320, 10th edit.) It will be remembered that trustees, unless forbidden, can invest in Government stocks, &c.

Q.—Does a power to trustees to invest trust moneys on railway debentures warrant an investment on debenture stock?

A.—Yes. By 34 & 35 Vict. c. 27, s. 1, a power to trustees to invest in the mortgages or bonds of a railway company, or of any other description of company, will, unless the contrary is expressed in the instrument creating the power, include a power to invest in debenture stock, and, by 38 & 39 Vict. c. 83, in local authority loans.

Q.—A trustee is bound under the terms of his trust to invest the trust funds upon Government or real security. He fails to do so, and simply keeps the money in his own hands. What rights have the parties beneficially interested against him? Would those rights be in any and what way altered if the trust were simply to invest in Government securities?

A.—Although the authorities are conflicting, it seems that where a trustee has the option of investing in two or more securities, as in the funds or on real security, the *cestui que trust* can only charge the trustee with the principal and interest, without further profits have been made by the improper employment of the money: (*Robinson v. Robinson*, 21 L. J. Eq. 111, 725; 7 H. of L. 343; Roberts' Prin. of Eq. 184, 3rd edit.) Where the trustee is bound to invest in Government securities and fails in doing so, the *cestui que trust* may at his option either claim to have the money and interest at 4l. per cent., or the stock which might have been purchased therewith at the time when the investment ought to have been made and the dividends.

Q.—Trustees are directed by the instrument creating the trust to invest the funds on such securities as they may think safe. Will this justify the trustees in investing the trust funds in the debenture stock of a sound railway company in which they have confidence? Give your reasons.

A.—This would probably be held within the scope of their discretion, as the security is of a permanent nature, and apparently not within the case of *Stewart v. Sanderson* (L. Rep. 10 Eq. 26.)

Q.—If a trustee, having received the sum of 1000l. cash, part of the trust estate, and having on account of the trust estate to disburse that amount within two or three days, pays it to his own bankers, to the credit of his private account with them (there being no trust account open at any bank), and his bankers stop payment, will he be responsible for the amount? and would the case be affected by the proviso that he is not to be responsible for loss by default of bankers?

A.—Had the trustee paid it to a separate account he would not have been liable (*Fenwick v. Clark*, 31 L. J. 778); but he is where he pays it to his own private account, for he then treats it as his own, and is liable for any loss occasioned by the banker's insolvency: (see Roberts' Prin. of Eq. 185.) The proviso for loss by default of bankers would only extend to moneys properly paid in to a separate account.

**Q.**—If one trustee receives trust money, and hands it over to his co-trustee, are both, or which of them, liable ?

**A.**—They will both be liable ; except in the case of money remitted to a co-trustee or co-executor, to be paid by him in his neighbourhood where the trustee or executor remitting the same, in case he had money of his own, would naturally have remitted it to some one to pay it away instead of undertaking a journey for the purpose of paying it himself : (Sm. Man. sect. 367 ; *Townley v. Sherborne*, 2 L. C. Eq. 718, 2nd edit. ; *Brice v. Stokes*, *ib.* 725.)

**Q.**—Distinguish between the responsibilities of trustees and executors for the acts of each other.

**A.**—Co-executors, like co-trustees, are generally answerable each for his own acts only, and not for the acts of any co-executor to which he is not privy. But in respect of receipts, the case of co-executors is materially different from that of co-trustees. An executor has, independently of his co-executor, a full and absolute control over the personal assets of the testator. If an executor join with a co-executor in a receipt, he does a wanton and unnecessary act ; he interferes when the nature of the office lays upon him no such obligation, and therefore it was a rule very early established that if executors joined in receipts, they should be answerable each *in solido* for the amount of the money received. But when a trustee joins in a receipt for conformity alone, but without receiving, he will not be rendered liable for a misapplication by the trustee who receives unless the act is coupled with a subsequent neglect of duty : (see *Brice v. Stokes*, 2 L. C. Eq. 877 ; *Lewin*, 246 ; *Sn. Eq.* 5th edit., 157.)

**Q.**—Where a testator possessed of leaseholds, reversionary interest, and annuities for life dies, having by his will bequeathed his property upon trust for his widow for life, and subject thereto upon trust for his children, and does not give any directions as to mode of dealing with his property, what is the duty of his executors as regards the realisation of the property above mentioned ?

**A.**—The duty of the executors would be to convert the property and put it into such a state of investment as to be securely available for all persons interested in it : (*Howe v. Earl of Dartmouth*, 2 L. C. Eq. 309.) The rule applies to all kinds of personalty which are of a wasting or perishable nature, and also to reversionary interests ; in the one case it protects the remainderman, in the other the tenant for life : (*Sn. Eq.* 160, 4th edit.)

**Q.**—Where personalty is directed to be converted as soon as conveniently may be, as between the executors and the persons principally interested in the estate, what time is allowed the executors for conversion ?

**A.**—One year is allowed, unless under the circumstances a longer delay is reasonable : (*Smith's Principles*, p. 108.)

**Q.**—On the death of a tenant for life, as between his representatives and the reversioner, who would be entitled to the apples, pears, and other fruits hanging on the trees, and the growing crops on lands in his own occupation at the time of his death ?

**A.**—The apples, &c., would belong to the reversioner ; but the growing

crops being emblements would go to the personal representatives of the tenant for life: (see notes to *Lewis Bowles' case*, Tudor's L. C. 27.)

Q.—What is the course of procedure where wasting property is included in general residuary bequest to be enjoyed by persons in succession?

A.—It must be sold by the executors and properly invested within a year from the death of the testator: (see *Brown v. Gellatly*, 2 Ch. App. 751.)

Q.—Is a trustee liable under any and what circumstances for the loss of a trust fund by the fraudulent act of his solicitor?

A.—Yes; although in employing such solicitor he may have exercised ordinary care and diligence: (*Bostock v. Floyer*, L. Rep. 1 Eq. 26; s. c. 13 L. T. Rep. N. S. 489.)

Q.—Where a trustee investing trust moneys makes an ordinary purchase on the Stock Exchange, is he liable for any loss which may arise to the trust estate in consequence of the default of the broker employed by him?

A.—Assuming the broker to be in good repute at the time of his employment, the trustee would not be liable to make good the loss: (*Re Speight*, App., L. Rep. 22 Ch. Div. 727.)

Q.—What is the rule in equity as to the purchase by a trustee of the trust estate; and what course would you advise on behalf of a trustee-purchaser in order to assure his title and prevent any after impeachment of it?

A.—A trustee cannot purchase of himself, and he is not allowed to become a purchaser of the trust property even at public auction: (Sm. Man. sect. 366.) When an estate is vested in a trustee upon trust for sale, and the trustee is desirous of becoming a purchaser, the only safe course is to issue a writ in the Chancery Division for the purpose of carrying the trusts into execution under the direction of the court, and apply to become a purchaser on offering to give more than any other person: (*Campbell v. Walker*, 5 Ves. 682; *Fox v. Mackreth*, L. C. Eq. 143, in *notis*, 3rd edit.)

Q.—If a trustee allow his agent to apply the trust fund in a manner constituting a breach of trust, of which the agent is aware, can the *cestui que trust* proceed in the Chancery Division both against the trustee and his agent, or against either of them at his option?

A.—If the agent knowingly receives the money as trust money, he constructively becomes a trustee, and if he *fraudulently* misapplies it, the *cestui que trust* may, it seems, proceed against him alone for its recovery: (*Rolfe v. Gregory*, 12 L. T. Rep. N. S. 162.) Ordinarily, however, the agent would only be liable to the trustee: (Lewin on Trusts, 146, 416, 4th edit.) It is clear that the *cestui que trust* may proceed against the trustee alone: (*Bostock v. Floyer*, 13 L. T. Rep. N. S. 489.) But it is better to bring both parties before the court: (Sm. Man. sect. 357.) (a)

Q.—Is the claim of a *cestui que trust* against a trustee for a breach of

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(a) Mr. Smith, in his *Mercantile Law*, says, "all parties to a breach of trust are equally liable, and there is between them no primary liability:" (pp. 115, 116, 7th edit.)

trust a simple contract, or specialty debt? State the reason for your answer.

A.—It is only a simple contract debt; for, although the trustee is accountable, yet he is not accountable as under a covenant, although the trust may arise under a deed. But if the trustee has acknowledged the debt under seal, or by deed declared that he will execute the trust, it is otherwise: (St. Eq. ss. 1285, 1286; Sm. Man. sect. 374; *Holland v. Holland*, 20 L. T. Rep. N. S. 58.)

Q.—When can a *cestui que trust* attach and follow the property of a trust which has been improperly applied by a trustee?

A.—If the alienee be a *volunteer* the estate may be followed into his hands, whether he had notice of the trust or not, and so if he be a purchaser with notice either actual or constructive.

But a purchaser without notice having the legal estate will be secure, because “where the equities are equal the law shall prevail,” unless he obtained a conveyance of the legal estate after discovering the trust: (Lewin on Trusts, 7th edit. 728; *Bassett v. Nosworthy*, 2 L. O. Equity.)

Q.—What course can a trustee or executor take who is desirous of avoiding future responsibility in respect of a fund held in trust for a person of unsound mind or otherwise; and what are the practical proceedings necessary, and to whom must notice be given? (a)

A.—By the 10 & 11 Vict. c. 96, trustees or executors are empowered to pay the trust money into court, in the matter of the particular trust, in trust to attend the orders of the court, and so obtain protection. An affidavit must be filed by the trustee or executor, intituled in the matter of the Act and of the trust, and set forth: (1) His name and address. (2) The place where he may be served with proceedings. (3) The amount of the trust fund. (4) A short description of the trust and trust instrument. (5) The names of the *cestuis que trust*. (6) The submission of the trustee to the orders of the court or judge as to the application of the funds. And there must be annexed to the affidavit a schedule in the same printed form as the lodgment schedule to an order, setting forth:—

- (a) His name and address.
- (b) The amount of money and description and amount of securities proposed to be lodged in court.
- (c) The ledger credit to be opened in the pay-office books in the matter of the particular trust to which the funds are to be placed.
- (d) Whether legacy or succession duty has been paid.
- (e) A statement whether money to be lodged in court and accumulations are desired to be invested in any or what Government securities, or whether it is deemed unnecessary so to invest the same.

On production of an office copy of this schedule the Paymaster-General will issue the necessary direction for giving effect to the lodgment. The payment, &c., being completed, notice is forthwith given to the *cestuis que trust*, the costs of payment in are deducted from the fund: (see Supreme Court Funds Rules, 1884, r. 41.)

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(a) Also put thus: A trustee has money in his hands for the benefit of a widow for life, and afterwards for her children. By what summary proceedings may he effectually relieve himself of the trust?



**Q.**—What is the course of proceeding on the part of persons beneficially entitled to the funds referred to in the last question, to enable them to get out the funds, and on whom must notice be served?

**A.**—The persons interested in or entitled to the funds, or any of them, may apply by petition as occasion may require, respecting the investment, payment out, or distribution of the fund, or of the interest or dividends thereof. But the trustee is to be served with notice of such application. Where, however, the trust fund does not exceed 1000*l.* cash or stock, the application may be made by summons instead of petition: (Ord. LV., r. 2, (5).)

**Q.**—Give instances where trustees are justified in paying or transferring stock into court under the Trustees Relief Acts.

**A.**—In all cases where there is a reasonable doubt or difficulty as to the mode in which the trust funds are to be dealt with; also where the parties entitled are under disability: (see 10 & 11 Vict. c. 96.)

**Q.**—Would a trustee who pays money under the direction of the court be entitled to a release? Give the reasons for your answer.

**A.**—This is not required, the order of the court being sufficient indemnity: (*Waller v. Barrett*, 24 Beav. 413.)

**Q.**—State the heads of the affidavit to be made in support of summons for leave to pay into court capital money arising under the Settled Land Act, 1882, by any person directed by the tenant for life to make such payment under that Act, and give the authority for your answer.

**A.**—(1) Name and address of person making payment. (2) Place for service of notices on him. (3) Amount to be paid in and account to which it is to be placed. (4) Name and address of tenant for life directing the payment in. (5) Short particulars of the transaction: (Rules of December, 1882, under Settled Land Act, r. 10.)

**Q.**—A married woman, having under her settlement a general power of testamentary appointment, makes a will giving the fund amongst various persons, and appoints executors. Uncertainty existing as to the title of the appointees of the fund, how should the trustees of the settlement proceed in order to obtain a discharge?

**A.**—The trustees should pay the money to the executors: (*Re Hoskin's Trust*, 5 Ch. D. 229; 6 Ch. D. 281.)

**Q.**—In the case of a will of doubtful construction, how are the executors to proceed so as to avoid personal responsibility?

**A.**—They must either have the assets administered in the Chancery Division under a judgment or order of the court, obtained on a writ or summons, or apply for the opinion and direction of the court or judge, as stated *infra*.

**Q.**—Can a trustee, executor, or administrator, by any, and if so by what, means obtain the opinion, advice, or direction of the court, without instituting an action?

**A.**—Yes; he may apply, by petition to the court, or by summons and statement at chambers, on notice to all parties interested, for the opinion and direction of the judge on any question touching the management of the trust property or assets. And the trustee, &c., acting in accordance

with the advice or direction of the judge is freed from responsibility, unless he has been guilty of fraud or misrepresentation in obtaining such advice or direction. The petition or statement must formerly have been signed by counsel (but by Ord. XIX., r. 4, this is now no longer necessary to any *pleading*, which, by the 1873 Act, c. 66, s. 100, includes petition or summons), and the judge may order the attendance of counsel to support it: (22 & 23 Vict. c. 35, s. 30; 23 & 24 Vict. c. 38, s. 9.)(a)

### SPECIFIC PERFORMANCE.

*Question.*—How did the remedy given by a court of equity for the non-performance of a contract differ from that given by a court of law?

*Answer.*—In the case of non-performance of contracts, not comprising a public duty, a court of law could formerly only award damages, notwithstanding the C. L. P. Act, 1854, s. 68 (see *Benson v. Paull*, 27 L. T. Rep. N. S. 78); whilst a court of equity compelled the specific performance thereof: (see Sm. Man. sects. 403, 404.)(b)

*Q.*—State the essential ingredients in contracts or agreements which are required in order to obtain a specific performance in equity, and will a parol contract ever be enforced?

*A.*—The essentials are that the contract be in writing, except in the three cases stated in the next answer, signed by the party to be charged, &c., made between parties able and willing to contract, for a valuable consideration which must not be illegal or immoral; the terms clear and definite, and a contract for the breach whereof damages would not compensate; there must be no fraud, and the plaintiff must have performed his part of the contract: (Sm. Man. tit. 2, ch. 8; *Cuddee v. Rutter*, 1 L. C. Eq. 640, 2nd edit.; *Seton v. Slade*, 2 *ib.* 429, *in notis.*)

*Q.*—Are there any circumstances under which an agreement for a lease for twenty-one years, not made in writing, would be enforced by equity? If so, state those circumstances, and the grounds on which such an equity would prevail.

*A.*—Yes. 1. Where the agreement is set out in the statement of claim, and is admitted by the defence, and the defendant does not set up the Statute of Frauds as a bar. 2. Where it has been prevented from

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(a) The following question is answered by the above: If a trustee feels a doubt as to the course he ought to adopt in a matter of discretion as to the sale of the trust property or otherwise, can he without anit obtain the directions of the court on the subject, and in what way?

(b) By the 21 & 22 Vict. c. 27, equity might also award damages for the non-performance of a contract either in addition to or in substitution for specific performance thereof. But before damages could be granted, the plaintiff must have established by proper evidence his right to specific performance: (*Lewers v. Shaftesbury*, 14 L. T. Rep. N. S. 855.) The exclusive jurisdiction of the Chancery Division to specific performance of contracts for the sale of real estate including contracts for leases is retained by the 1873 Act, s. 34, sub-s. 3, but the merger of the Equity and Common Law Courts has rendered the former Act unnecessary, and it has now been repealed: (46 & 47 Vict. c. 49.)

being reduced into writing by the fraud of the defendant. 3. Where there has been a part performance. The grounds on which a performance would be enforced in the first two cases speak for themselves, and in the third they are, that if the party permitting these acts to be done were allowed to avoid the bargain and treat the purchaser as a trespasser, it would be permitting him to commit a fraud, the very crime the statute was designed to prevent: (Sm. Man. sect. 444; *Lester v. Foxcroft*, 1 L. C. Eq. 625, 2nd edit.)

Q.—When will equity not enforce a contract by specific performance?

A.—When any of the requisites set forth in the two preceding answers do not exist.

Q.—Enumerate and discuss concisely some of the most usual defences to an action by vendor against purchaser for specific performance.

A.—That there was no agreement in writing; that the plaintiff had not performed his part of the agreement, as showing a good title to the property or to a material part; that the terms were not certain and definite; that the vendor was guilty of fraud, as in not disclosing certain facts relating to the property; that the property was misdescribed as to the tenure, &c.

Q.—In order to sustain an action for a specific performance of a contract, must a pecuniary consideration be shown; and is any distinction made in cases of sale by expectant heirs?

A.—A pecuniary consideration need not be shown, but a *valuable* consideration must appear, as money, or marriage. However, the court will not generally look at the quantum of the consideration. In the case of bargains from expectant heirs the buyer was formerly required to show that a fair price had been given, or that the bargain was made known to the person from whom the heir expects the property, and that he was able to relieve the expectant from his necessities: (Sm. Man. sects. 166–8, 421.)

Q.—Can specific performance be ordered of a parol agreement for a settlement in contemplation of marriage, where the marriage has taken place upon the faith of the parol agreement, but the agreement has not been reduced to writing? Give reasons for your answer.

A.—Specific performance of such a promise cannot be enforced; as contracts in consideration of marriage are required to be in writing by the 4th section of the Statute of Frauds, and equity does not consider the marriage alone sufficient to take the case out of the statute: (*Lassenec v. Terney*, 1 Mac. & G. 551, 572.)

Q.—What acts are considered by equity as sufficient acts of part performance, and what is sufficient to take a contract out of the Statute of Frauds?

A.—Delivery of the abstract, giving directions for conveyances, going to view the estate, fixing upon an appraiser to value stock, making valuations or admeasurements, registering conveyances, and acts of the like preliminary character, are not sufficient as a part performance to take a contract out of the Statute of Frauds. But admitting a purchaser into possession will generally be sufficient. So if, on a parol agreement to

grant a lease, the lessee is let into possession, and allowed to spend money on the faith of the agreement, the contract will be enforced: (Sm. Man. sect. 448.)

**Q.**—What acts amount to part performance of a parol agreement to sell land? Does the delivery of the abstract, the payment of deposit, or letting the alleged purchaser into possession?

**A.**—The acts must be such as are clearly and exclusively referable to a complete agreement, and must have been done with no other view than to perform such agreement. Delivering the abstract or paying deposit does not amount to part performance; but letting the purchaser into possession does: (*Lester v. Foxcroft*, 1 L. C. Eq. 625, 2nd edit.; Sm. Man. sect. 448).

**Q.**—Where a party engages for the performance of an agreement under a certain penalty, can the party relieve himself from the performance by offering to pay the penalty, or will equity, notwithstanding, compel the performance?

**A.**—He cannot so relieve himself; equity will still enforce the agreement: (Sug. Conc. V. 158; Sm. Man. sect. 453: (*Peachey v. Somerset*, L. C. Eq. 895, 2nd edit.))

**Q.**—A purchaser of an estate under a sale by the court dies before the certificate becomes absolute, without having signed an agreement. What effect has such death upon the sale? and is, or is not, a sale by the court within the Statute of Frauds?

**A.**—A sale under the decree of the court will be carried into execution, although the purchaser did not subscribe any agreement, sales by the court not being within the Statute of Frauds; and if the purchaser dies before the certificate becomes absolute, this, it seems, will not vacate the sale. But it cannot be enforced against his representatives without instituting an action for that purpose: (see Sug. Conc. V. 64, 68.)

**Q.**—Will equity enforce specific performance of an agreement for reference to arbitration? And give the reason for your answer.

**A.**—It will not; deeming it against public policy to exclude any person from the appropriate tribunals: (St. Eq. § 1457; Sm. Man. sect. 440; *Cook v. Cook*, L. Rep. 4 Eq. 77; *Horton v. Soyer*, 33 L. T. Rep. 287; *Pickering v. Capetown Railway*, 13 *ib.*, N. S. 570.)

**Q.**—Under what circumstances will the court enforce the specific performance of an award, and when will the court grant relief against an award?

**A.**—The courts of equity will decree specific performance of an award in all cases where the thing ordered to be performed is such as would be enforced if the same were by agreement amongst the parties. Thus an action will lie for specific performance where anything is awarded to be done in specie, as the conveyance of land or the like: (*Hall v. Hardy*, 3 P. Wms. 190), unless there be uncertainty in the award: (*Hopcroft v. Hickman*, 2 S. & S. 130.) But an action will not lie to compel the execution of an award for the payment of money; the proper remedy in such case is either by action or attachment on the award: (3 P. Wms. 190 n.) Nor will the court grant specific performance when a long time has elapsed without any attempt to enforce the award: (*Eads v. Williams*,

24 L. J. 531, Ch.) As to when the court will set aside an award see *ante*, pp. 166, 424.

Q.—How far will the court enforce the specific performance of an agreement to enter into partnership, or give damages for the breach of it?

A.—The court will not as a rule enforce specific performance of such an agreement, nor give damages for the breach of it. But if the parties had agreed to execute some formal instrument altering their position at law, and creating a partnership between them, the court, formerly for the purpose of putting the parties into the legal position agreed upon, would decree the execution of the instrument, though the partnership might be immediately dissolved: (Lind. Part. 947, 948, 2nd edit.)

Q.—Would the court decree specific performance of articles of apprenticeship? Give the reason for your answer.

A.—It seems this might be done unless the apprentice were an infant. But if damages would be sufficient remedy, specific performance would be refused: (see *Brown v. Banks*, 3 Giff. 190.)

Q.—Will the court, under any and what circumstances, enforce specific performances for sale of a goodwill?

A.—The court will not enforce specific performance of a contract for the sale of a goodwill only; but where the goodwill is altogether or principally annexed to premises, a contract for the sale of the goodwill and premises may be enforced: (Fry on Spec. Perf. 17.)

Q.—Would the court adjudge specific performance of an agreement for the sale of a medical practice? Give the reason for your answer.

A.—In *May v. Thomson* (51 L. J. Div. 917, Ch.) it was held that the sale of a medical practice was really the sale of the introduction to the patients, and as this would involve personal service, the court said (although the action failed on another point) they could not see their way to making a decree for the specific performance of such an agreement.

Q.—In what cases will the court enforce specific performance of the sale or purchase of an estate when the price is agreed to be fixed by the arbitration of third persons?

A.—When the arbitrators act with fairness and impartiality, and fix the price, then and not till then, the contract being complete, the court will order specific performance thereof: (St. Eq. §§ 1458, 1459; Sug. Conc. V. 203; Sm. Man. sect. 441.)

Q.—When the consideration in a contract for a purchase is an annuity for the life of a vendor, and he dies before completion, will the court enforce it?

A.—Yes; for equity looks upon that as done which is agreed to be done (Sug. Conc. V. 209; Lord St. Leonards' Handy Book, 47, 6th edit.); and the death of the vendor is not an unforeseen occurrence, so as to entitle equity to give relief under the head of accident: (St. Eq. § 104.)

Q.—A. agrees to purchase of B. an annuity on the life of C., C. dies the day after the contract; can B. enforce payment of the purchase money? Could he have done so had C. died the day before the contract? Give the reasons for your answer.

A.—The court will enforce specific performance in the first case, because damages would not compensate, and the accident is not unavoidable. But not where the subject-matter of the contract did not exist at the time the contract was made: (Tud. L. C. Eq. 717, 3rd edit. ; Sug. Conc. V. 209.)

Q.—If A. contracts to sell land to B., and upon investigation of the title it is found doubtful, can B. compel A. to complete the sale, either with or without giving an indemnity?

A.—It appears now settled that the court can neither compel a purchaser to take an indemnity nor a vendor to give it, in the absence of a contract to that effect; but the purchaser may take the estate without any indemnity if he chooses: (Sug. Conc. V. 215, 277, 278, &c.)

Q.—If A. brings ejectment against the lessee at the expiration of the lease, and the lessee desires to set up a contract by A. to sell him the fee simple in the property comprised in the lease, in what manner can the lessee obtain the benefit of such contract, and in what division of the court ought the action to be tried?

A.—The courts have power to grant to any defendant in respect of any equitable estate or right all such relief against any plaintiff or plaintiffs as such defendant shall have properly claimed by his pleading: (sect. 24, sub-s. 3, 1873 Act.)

If the writ is not issued in the Chancery Division the defendant should apply to have it transferred there under Ord. LI., as specific performance relating to land or leaseholds is reserved to that division by sect. 34 of the 1873 Act.

Q.—Which of the following contracts can be enforced by a bill for specific performance, and to what extent. Give your reason in each case.

- (1) An agreement to play Hamlet for three weeks at a certain theatre.
- (2) An agreement to paint a staircase in fresco.
- (3) An agreement to supply an asylum with meat.
- (4) An agreement not to foul a stream.

A.—The fourth agreement, being an agreement not to do a certain action, the court will by injunction enforce its performance; in the earlier agreements the court will not, because it cannot secure their performance: (see *Lumley v. Wagner*, 1 De G. M. & G. 644.)

Q.—Will the court enforce a voluntary contract in the nature of a settlement?

A.—No; not a voluntary contract, though it is in the nature of a settlement, and made in favour of a wife and children: (*Ellison v. Ellison*, 1 L. C. Eq. 199, 2nd edit.) But if the contract is completed by conveyance, and no act remains to be done to give full effect to the title, equity will then enforce it, or rather uphold it against the settlor, although it be merely voluntary: (*Ib. Dickinson v. Burrell*, 13 L. T. Rep. N. S. 660; Sm. Man. sect. 421.)

Q.—A man frequently promises by letters addressed to his illegitimate daughter that he will provide for her in a specified manner. He dies without doing so. How would you advise the daughter as to her position and course of action?

A.—The promises contained in the letters being purely voluntary could



not be enforced. It would be better therefore to advise the daughter not to attempt litigation, or rely upon hopes of obtaining anything from the estate of her deceased father.

*Q.*—What is a meritorious consideration, and will it support a contract in equity?

*A.*—A meritorious consideration is one which does not consist of money payment, but arises from natural love and affection, as for an *already* taken wife. It is now settled that a meritorious consideration will not support a contract in equity: (Sm. Man. *sup.*; *Ellison v. Ellison*, *sup.*; *Dickinson v. Burrell*, *sup.*)

*Q.*—A. makes a voluntary settlement of his estate and then enters into an agreement for value to sell it; will equity compel specific performance of the agreement?

*A.*—Yes, at the suit of the purchaser; but not at that of the vendor: (Sm. Man. sect. 421; but see hereon *Townend v. Toker*, 14 L. T. Rep. N. S. 513.)

*Q.*—Will equity in any, and what, cases compel a purchaser to accept an equitable title without a conveyance of the legal estate?

*A.*—Yes, when the legal estate is outstanding without any claim of interest by the person in whom it is vested; or when the estate is sold under a judgment of the court; and if the legal estate appears to be outstanding, and *cannot* be got in, yet if from surrounding circumstances the law would presume a reconveyance, the purchaser will be compelled to take the title, but not otherwise: (Sug. Conc. V. 287, 289.)

*Q.*—If an owner of freeholds has only an equitable and not the legal estate in them, and enters into a contract for sale, is he liable to an action for specific performance?

*A.*—If he is able to obtain a conveyance of the legal estate, equity will compel him to do so, and decree specific performance. And see preceding answer.

*Q.*—In the absence of express contract can a vendor of leaseholds compel specific performance without producing the lessor's title? State the reasons on which you rest your opinion.

*A.*—He can now do so, when the lease is derived from the freeholder, as 37 & 38 Vict. c. 78, s. 2, provides that on a contract for sale of leaseholds the intended assignee shall not be entitled to require production of the freeholder's title. In sales after 31st December, 1881, he can also do so in case of a sub-lease (44 & 45 Vict. c. 41, s. 3).

*Q.*—A., being a solicitor, agrees to sell his business as such solicitor to B.; is, or is not, this such an agreement as the court will enforce? and give the reason for your answer.

*A.*—In the case of *Bozen v. Farlow* (1 Meriv. 459), specific performance of an agreement to purchase the business of an attorney was refused at the instance of the vendor; there being no express stipulation by which the court might be enabled to carry it into effect on his part, in return for the defendant's purchase money: (see Gold. Eq. 177-179, 4th edit.) But such an agreement would be enforced if it contained an agreement to

assign the business premises, and not to practise within a reasonable distance : (see Fry on Spec. Perf. p. 18.)

*Q.*—A writ is issued on the 25th December, 1883, for specific performance of a contract for sale of land, and served on the same day. If no extension of time be granted to either plaintiff or defendant, within what periods must the following steps in the action be taken, viz.: entry of appearance—delivery of statement of claim—of defence—of joinder of issue in reply, and notice of trial?

*A.*—Entry of appearance within eight days (Ord. XII., r. 22)—Delivery of statement of claim within six weeks from appearance (Ord. XX., r. 1)—Statement of defence within ten days after statement of claim, or if no statement of claim is required within ten days after appearance (Ord. XXI., r. 6)—Joinder of issue in reply within three weeks after statement of defence (Ord. XXIII., r. 1)—Notice of trial should be given within six weeks after close of pleadings by plaintiff—if this is not done defendant may do so, or may move to dismiss : (Ord. XXXIV., r. 4.)

*Q.*—In an action for specific performance of a contract for the sale of an estate, is it competent to either the vendor or the purchaser to obtain a reference as to the title, or can this be done by one only, and which, of such contracting parties?

*A.*—Formerly this could not be done by the defendant (*Reed v. The Don Pedro, &c., Mining Co.*, 9 L. T. Rep. N. S. 132 L.JJ.); but either party could now apply under Ord. XXXIII.

*Q.*—In an action for specific performance of an agreement, is the plaintiff bound by the title as shown by him at the time of issuing his writ?

*A.*—No; the vendor has the opportunity of making out a better title upon the inquiry; and if he can show a good title at any time before the certificate, it will entitle him to judgment; and even after the certificate, if he can satisfy the court that he can make a good title by clearing up the objections certified, the court will give judgment in his favour : (Ayck. Pr. 259, 260, 9th edit.)

*Q.*—In an action by a vendor for specific performance, the chief clerk certifies that a good title cannot be made. What will be the order on further consideration?

*A.*—An order for the plaintiff to pay the defendant's costs and to return his deposit with interest; and, on this being done, the action to be dismissed. The defendant may also, if he requires it, have a declaration that his deposit, interest, and costs are a lien on the estate, with liberty to apply in chambers to give effect to such lien : (*Turner v. Marriott*, 3 Eq. 744.)

*Q.*—When will letters operate as a binding agreement for the sale and purchase of an estate?

*A.*—When they contain the particulars necessary to form a contract, as a description of the property sold, the price, &c. There must also be an offer on the one side and an acceptance on the other, without introducing any new stipulation or any exception; if the letters amount merely

to a treaty, neither party can enforce them : (see Sug. Con. V. 80, 84 ; *Kennedy v. Lee*, 3 Mer. 441.)

*Q.*—A. writes to B., offering him 5000*l.* for the purchase of his (B.'s) freehold house in Berkeley-square. B. writes to A. in answer accepting the offer, and adding that he will instruct his solicitors to prepare an agreement. A. and B. differ afterwards upon the details of the intended agreement, and none is signed. Can specific performance be enforced at the suit of A. or B., or both ?

*A.*—It can be enforced at the suit of either party, as there is a complete agreement by the letters ; and the sending them to a solicitor to prepare a formal agreement does not alter the rights of the parties : (*Fowle v. Freeman*, 9 Ves. Jun. 361.)

*Q.*—By what course of proceeding is A.'s or B.'s remedy to be enforced, according to the present practice, if it lies ?

*A.*—A. or B. should issue a writ in the Chancery Division for specific performance of the contract : (see Ayck. Pr. 258, 9th edit.)

*Q.*—Your client buys an estate ; on the investigation of the title it appears that the vendor cannot make a good title to a small field detached from the rest of the property, and not of any material consequence to your client, who, however, wishes to be off his bargain : will the court compel him to fulfil his contract, and upon what terms ?

*A.*—Yes, upon the terms of his making the purchaser compensation for the field. The question in such cases always is, " whether the part to which a title cannot be made is material to the possession and enjoyment of the rest of the estate : " (see Hughes' Conv. 140, 141 ; Sug. Conc. V. 221, 225.)

*Q.*—On what principle does equity act when it compels a purchaser to perform a contract taking an abatement of price ?

*A.*—The principle is that the purchaser gets substantially the property for which he contracted, and that possession of the part to which the vendor cannot make a title is not material to the enjoyment of the whole : (see Sm. Man. 13th edit., Chap. VIII.)

*Q.*—Under what circumstances may a purchaser of property at an auction be debarred from relief on the ground of misdescription, though it be shown that the property was inaccurately described in the particulars ?

*A.*—Where the purchaser can get that which it was his real object to obtain, he must carry out his contract, taking compensation for the deficiency in value, or even without compensation when the deficiency is very trifling, and the condition provides against there being any compensation at all. So also he will not be entitled to relief when he has bought with full knowledge of the facts : (see Deane's Conv. 2nd edit. 331.)

*Q.*—If a purchaser of freeholds has notice of an equitable claim, and sells to a person who has not notice, is the latter purchaser affected with the first purchaser's notice ?

*A.*—He is not : (*Harrison v. Forth*, Prec. Ch. 51 ; 2 L. C. Eq. 42 ; Sm. Man. sect. 191.)

**Q.**—What is the effect of a resale by a purchaser of freeholds, who has no notice of an equitable claim, to a person who has notice, can either party enforce specific performance against the other?

**A.**—The second purchaser, though he had notice of the equitable claim, will hold the property free from it; for otherwise an innocent purchaser might be unable to sell his estate: (Sm. Man. sect. 191; *Harrison v. Forth*, *ubi sup.*; *Lowther v. Carlton*, 2 Atk. 242.) Either party can enforce specific performance.

**Q.**—On the offer of the late East Indian Loan, 'A. tendered, in writing, to take 100,000*l.* at 102 per cent. and the Company, in writing, accepted the tender, but A. refused to complete the bargain: will the court enforce the fulfilment of the contract? State the reason for your answer.

**A.**—The court would not enforce the specific performance of this contract against A., because damages would amount to a compensation: (St. Eq. §§ 717, 718, Sm. Man. sect. 404; *Cuddee v. Rutter*, 1 L. O. Eq. 640, 2nd edit.)

**Q.**—Will the court decree the specific performance of a covenant to invest money in lands, and to settle them in a particular manner?

**A.**—Yes, if there is a valuable consideration for the covenant. And if a man covenants to purchase and settle lands, and afterwards accordingly purchases lands of equal or greater value, they will be held to have been purchased with an intent to perform the covenant: (see Sug. Conc. V. 561; *Wilcocks v. Wilcocks*, 2 L. O. Eq. 345, 2nd edit.; *Blandy v. Widmore*, *ib.* 347, and notes.)

**Q.**—An agreement for sale of a reversion provides that the purchaser shall take the vendor's title as it stands—that the purchase shall be completed on a fixed day, and that time shall be of the essence of the contract. What is the effect of the last provision?

**A.**—That if the purchase be not completed on the day fixed, it may be treated as abandoned, if proper diligence has been used, &c. But if the purchase is proceeded with, it is a waiver of the right to avoid the contract: (see St. Eq. § 716.)

**Q.**—Give some instances of cases in which time is deemed of the essence of a contract.

**A.**—Time is of the essence of the contract in cases of sales of mines and leaseholds, and it would appear also on the sale of a reversion or next presentation to a living: (*Hudson v. Temple*, 3 L. T. Rep. N. S. 495, 497, M.R. and see *Law Times*, May 4, 1861, p. 320. And as to time being of the essence of the contract, see sect. 25, r. 7, of the Judicature Act, 1873, *ante.*)

**Q.**—What effect has the Supreme Court of Judicature Act, 1873, upon stipulations as to time in contracts?

**A.**—That stipulations as to time in contracts which would not before the passing of the Act have been deemed to be of the essence of the contract in a court of equity, shall receive in all courts the same construction as they would have previously done in a court of equity: (1873 Act, s. 25, r. 7.)

*Q.*—How far is the maxim *caveat emptor* carried by the court for specific performance? Does it warrant misrepresentation or artifice in a vendor to procure a contract? State the principles upon which the court proceeds.

*A.*—This maxim applies if the defects in the estate be patent; if there be no fraud, misrepresentation, concealment, or artifice to disguise the thing sold the purchaser can have no relief. Thus, where a meadow was sold to the owner of a house and ground adjoining without any notice of a footway round it, and also one across it, which of course lessens its value, specific performance was decreed with costs, as it was not a latent defect; had the purchaser used ordinary caution he would have discovered the easement: (see *Sug. Conc. V. 288, &c.*)

*Q.*—A. purchases a piece of land at a sale by auction, and, after the sale, discovers that there is a public footpath across the land, which is not mentioned in the particulars or conditions of sale; would the court release A. from his contract? Give the reason for your answer.

*A.*—It would not, as the vendor is not bound to point out patent defects: (*Oldfield v. Round*, 5 Ves. 508; *Dart's V. & P.* 5th edit. 92.)

*Q.*—A. supposing he has right to enter into a written agreement for sale of an estate to B. which estate belongs to C., will B. in an action for specific performance against A. and C. be entitled to a judgment?

*A.*—B. will not be entitled to a decree for specific performance against A. and C. (*St. Eq. § 1048*, note), unless C. knew of the sale, and did not forbid it, and thereby B. was induced to become the purchaser under the supposition that the title was good: (*Ib.*, § 385.)

*Q.*—Define champerty and maintenance respectively, and state some of the cases in which exception is made to the general rule against champerty and maintenance.

*A.*—Champerty (*campi partitio*) is a bargain between a plaintiff or defendant in a cause, and another person who has no interest in the subject in dispute, to divide the property (*campum partiri*) sued for between them if they prevail at law, in consideration of the other person carrying on the suit at his own expense. Maintenance is properly an officious intermeddling in a suit which in no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it. Exceptions are made, however, to the rule against champerty and maintenance in the case of father and son, or of the husband of an heiress, or of a master and servant, or the like: (*Sm. Man. sect. 430.*)

*Q.*—Would the court uphold an agreement made between a creditor and a third person to maintain an action of the former and share the profits resulting from the success of the action? Give the reason for your answer.

*A.*—No; such an agreement, as constituting champerty, would be void: (see *Hutley v. Hutley*, L. Rep. 8 Q. B. 112.)

*Q.*—What amounts to an equitable assignment?

*A.*—Anything written, said, or done for consideration, to place a *chose in action* or fund out of the control of the owner, and appropriate it in favour of another person, amounts to an equitable assignment. To perfect

his title the assignee should immediately give notice of the assignment to the debtor or holder of the fund : (St. Eq. § 1047 ; Sm. Man. sect. 435.)

Q.—If A. assigns to B. a policy on his own life for a valuable consideration and subsequently assigns the same policy to C. also for a valuable consideration, and B. and C. both give notice of their respective assignments to the assurance office, but C.'s notice is served on the office before B.'s notice, what will be the relative legal position of B. and C. ? (a)

A.—C. will, if he had no notice of B.'s assignment, have priority over B. ; for the policy is a *chose in action* which, in order that a complete title may be acquired by assignment, requires notice to be given to the debtor or holder of the fund ; and he who gives notice to him first has priority : (*The Consolidated Insurance Company v. Riley*, 1 L. T. Rep. N. S. 209 ; St. Eq. § 1047 ; Sm. Man. sect. 436.)

Q.—Is the assignee of a *chose in action* bound by all the equities to which it is liable in the hands of the assignor, and why ?

A.—He is so bound even without notice, unless the *chose in action* be a bill of exchange or promissory note, for the assignor cannot confer a better title than he himself had : (*Row v. Dawson*, 2 L. C. Eq. 736, *in notis*, 3rd edit. ; Sm. Man. sect. 439 ; see 1873 Act, s. 25, sub-s. 6.)

Q.—In what cases can a writ be issued for the delivery up of specific chattels to the owners ?

A.—In those cases only where the chattel is of such a nature that the loss could not be fully compensated for by damages. As where the chattel is a family relic or heirloom, such as a horn by which a tenure is held, or an altar-piece : (*Pusey v. Pusey*, 1 L. C. Eq. 654, 2nd edit. ; *Duke of Somerset v. Cookson*, *ib.*, 655.)

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## ACCOUNT.

Question.—State some of the cases in which a bill in equity for an account laid.

Answer.—A bill in equity for an account laid between trustee and *cestui que trust* ; in partnership transactions ; by principals against their factors and agents ; and by mortgagors against mortgagees who had been in possession : (Gold. Eq. 82 *et seq.*, 4th edit.)

Q.—In an action for an account is it competent for the court to direct that the books in which the accounts required to be taken have been kept, shall to any, and to what, extent be deemed evidence of the truth of the matters therein contained ?

A.—Yes, the court may direct that such books be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised : (15 & 16 Vict. c. 86, s. 54 ; Hal. Suit. 75.)

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(a) Also asked thus : By what means may a subsequent incumbrancer of a *chose in action* gain priority over a prior incumbrancer ?



Q.—In what manner, and under what circumstances, can an order be obtained summarily for an account of a partnership, executorship, or trust?

A.—The order may be made at any time after default of appearance to a summons specially indorsed and claiming such account or after appearance, unless the defendant satisfy the court that there is some preliminary question to be tried. The application must be supported by affidavit, stating the grounds of plaintiff's claim to the account: (Ord. XV., rr. 1, 2.)

Q.—If an account be settled between parties, and signed, will the court open the account generally or partially, and, if so, upon what principle?

A.—Generally, where an account has been settled, the rule is only to give liberty to surcharge and falsify the account where errors of fact or law are shown in the account, and not to open the account generally, unless fraud is alleged, or the account is between trustee and *cestui que trust*. For equity discourages laches: (St. Eq. § 527; Sm. Man. sect. 459; Dan. Ch. Pr. 6th edit., 484.)

Q.—Distinguish between the effect of opening the accounts, and that of giving liberty to surcharge and falsify.

A.—Where an account is opened generally, the onus of proof is thrown on the party bringing it in, in the other case the account is deemed correct until proved the contrary.

Q.—When is leave given to surcharge and falsify accounts?

A.—In proceedings for an account, if the defence is that there has been an account stated, the court will not interfere, unless on the ground of mistake, accident, fraud, or undue advantage, by which the account stated is in truth vitiated, and the balance incorrectly fixed. In such cases the court will in some cases direct the whole account to be opened and taken "*de novo*," but when the mistake or inaccuracy is not shown to affect or stain all the items of the transactions, the court will allow the account to stand with liberty to the plaintiff *to surcharge and falsify* it. The showing an omission for which credit ought to be given is a surcharge, the proving an item to be wrongly inserted is a falsification: (Snell, 5th edit., 510.)

Q.—Was there any, and what, advantage in the proceedings of a court of equity over those of a court of common law in questions of account?

A.—The proceedings in an action of account being difficult, dilatory, and expensive, it was seldom used, especially if the demand were of consequence, and the matter of an intricate nature; for in such cases it was more advisable to resort to a court of equity, where matters of account were more commodiously adjusted, and determined more advantageously for both parties: (St. Eq. § 443; Sm. Man. tit. 3, ch. 1.)

Q.—What is the law as to appropriation of payments?

A.—See answer, *ante*, p. 31: (Sm. Man. *sup.*)

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## ADMINISTRATION.

*Question.*—Set forth the several stages of an administration action down to a final judgment, distributing the funds brought into court to the various classes of persons usually entitled when the assets are more than sufficient to pay debts and legacies.

*Answer.*—This action down to judgment will be similar to other actions. The judgment, will, however, be preliminary, and direct the accounts and inquiries set out *post.* (a) These will be worked out in chambers, as hereafter stated. When the eight days have elapsed from the filing of the chief clerk's certificate, the action may then be brought on for further consideration, and a final judgment made. If the assets are more than sufficient to pay debts and legacies, the surplus, being personalty, will belong to the next of kin.

*Q.*—Give a brief outline of the proceedings in the Chancery Division to administer an intestate's personal estate, when there are no next of kin, *ab ovo usque ad mala.* (b)

*A.*—Administration would be granted either to a creditor or the Solicitor of the Treasury for the Crown: (Coote Prob. Pr. 97-99, 6th edit.) If granted to a creditor, he issues a writ against other creditors, making the Attorney-General a party. The proceedings are the same as in other suits down to judgment, which is interlocutory, directing the usual accounts and inquiries. These are worked out in chambers in the usual way. This done, the chief clerk makes his certificate, which is approved and filed in the usual way. The action then comes on for further consideration, and for default of next of kin the surplus, if any, is handed over to the Crown. If the crown solicitor administers, a creditor should issue a writ against him for administration: (see Sm. Pr. 311, 689, &c., 7th edit.)

*Q.*—What protection did a court of equity afford to creditors of persons deceased?

*A.*—The protection acquired by creditors, through the aid of a court of equity, was the payment of their debts, the marshalling of assets and securities, and the equal administration of the deceased's estate: (see St. Eq. §§ 552, 554, 558, 633, &c.) The Chancery Division retains this exclusive jurisdiction: (1873 Act, s. 34, sub-s. 3.) But the administration of a deceased's insolvent estate may now be carried out in the Bankruptcy Court: (46 & 47 Vict. c. 52, s. 125.)

*Q.*—Would a court of equity under any, and what, circumstances restrain a creditor from proceeding at law who was not a party to a suit; and how?

*A.*—Yes; as soon as a decree to account was made in a creditor's suit for the administration of assets, equity would, if the executor admitted assets (see *Lawton v. Lawton*, 3 L. T. Rep. N. S. 205), restrain a creditor,

(a) These actions are, however, generally heard as short causes, without any statement of claim or pleadings, and minutes of the judgment are also usually agreed upon between the counsel, and merely assented to by the judge.

(b) "*Ab ovo usque ad mala*" literally means "from the egg to the apple." The Roman feasts began with eggs and ended with apples. English lawyers, therefore, use this expression to mean "from the commencement to the end."

by injunction, from proceeding at law: (Sm. Man. sect. 468.) Unless, indeed, the creditor had obtained judgment before decree, which he might execute: (see *Fowler v. Roberts*, 2 L. T. Rep. N. S. 368.) This right of restraining by injunction is now abolished, but application to stay the proceedings should be made to the Division of the High Court in which the proceedings are taken: (1873 Act, s. 24, sub-s. 5.)

**Q.**—State the several proceedings which may be adopted by a creditor who finds it necessary to resort to equity to enforce the payment of a debt due from his deceased debtor.

**A.**—A creditor may enforce payment of his debt, and have the estate of his deceased debtor administered in equity either by issuing a writ or taking out an administration summons in the Chancery Division for such purpose, or if the estate is insolvent present a petition in bankruptcy: (Sm. Man. sect. 468.)

**Q.**—Describe the several steps in an administration action commenced by summons, proceeding in the most expeditious manner possible.

**A.**—A summons is taken out and sealed at the Central Office, and a duplicate filed there; it is then served. If the executor appears he does so at such office, and gives notice thereof. On the return of the summons the parties attend at the judge's chambers, when an order for administration may be made, which must be drawn up, passed, and entered. The accounts and inquiries are then proceeded with, and in due course the chief clerk makes his certificate, which is signed, approved, and filed. The action and matter then come on for further consideration, and a final judgment is made, the costs taxed, and the assets distributed: (Evans' Ch. Pr. 20 *et seq.* See Ord. LV.)

**Q.**—By what summary process can a legatee or creditor, or next of kin of a deceased person, procure the administration of his real and personal estate? (*a*)

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(*a*) The executors or administrators of a deceased person or any of them, and the trustees under any deed or instrument or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, next of kin, or heir-at-law, or customary heir of a deceased person, or as *cestui que trust* under the trust of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may take out, as of course, an originating summons returnable in the chambers of a judge of the Chancery Division, for such relief, of the nature or kind following, as may by the summons be specified, and as the circumstances of the case may require (that is to say), the determination, without an administration of the estate or trust, of any of the following questions or matters:—

- (*a*) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or *cestui que trust*;
- (*b*) The ascertainment of any class of creditors, legatees, devisees, next of kin, or others;
- (*c*) The furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts;
- (*d*) The payment into court of any money in the hands of the executors or administrators or trustees;
- (*e*) Directing the executors or administrators or trustees to do or abstain from doing any particular act in their character, as such executors or administrators or trustees;
- (*f*) The approval of any sale, purchase, compromise, or other transaction;
- (*g*) The determination of any question arising in the administration of the estate or trust: (Ord. LV., r. 3.)

**A.**—Any such persons may obtain a summons from a Chancery judge at chambers requiring the executor or administrator to attend before him at chambers, to show cause why an order for the administration of the real and personal estate of the deceased should not be granted; and if the order is granted it has the effect of a judgment made on the hearing of a cause: (Ord. LV., r. 4.)

**Q.**—In what way and in what case can a person claiming to be a creditor, or interested under a will, procure the administration of the real estate?

**A.**—These persons may now in like manner, by summons at chambers, obtain an order for the administration of the real estate of a deceased person: (Ord. LV., r. 4.)

**Q.**—Can a creditor issue a writ on behalf of himself and all other the creditors of the testator for the administration of his estate against the executors before the will has been proved?

**A.**—Yes; if the executors have elected to administer; for the rights of the creditors are not to be impeached by the delay of the executors: (Wms. Exors. 219, 3rd edit.) But probate must be obtained before judgment: (Seton on Decrees, 46, 2nd edit.)

**Q.**—Write out the title of the proceedings and the indorsements on the writ in an action by A. B., a creditor, to administer the real and personal estate of X. Y., who died intestate, C. D. being his administrator and E. F. his heir-at-law.

**A.**—In the High Court of Justice.—Chancery Division.  
V.-O. or Mr. Justice

In the matter of the estate of X. Y., deceased.

Between A. B., on behalf of himself and all other  
creditors of X. Y., deceased, who shall  
come in and contribute to the costs of  
this action . . . . . Plaintiff,

and

C. D. and E. F. . . . . Defendants.

The plaintiff's claim is for the administration of the real and personal estate of X. Y., formerly of, &c., deceased, and for a receiver of the personal estate and the rents and profits of the real estate of the said X. Y., and for such further and other relief as the nature of the case may require.

The plaintiff sues as a creditor of the said X. Y.

The Defendant C. D. is sued as the administrator of the said X. Y., deceased, and the Defendant E. F. as the heir-at-law of such deceased.

**Q.**—In partnership and administration actions, what advantage, as regards subsequent proceedings, is gained by indorsing the writ of summons with a claim that an account be taken?

**A.**—That, in default of appearance (after affidavit of service), or after appearance, unless the defendant satisfies the court that there is some preliminary question to be tried, an order will be made for the account, with all directions formerly usual in the Court of Chancery in similar cases: (M'I. & E. Prac. p. 141.)

**Q.**—A creditor sues for administration of the estate of a deceased person. The executors or administrators admit assets. What will be the form of the judgment?

**A.**—If the executor or administrator admits assets, the judgment will be, not for an administration of the deceased's estate, but for payment of the creditor's debt and costs: (Haynes, p. 113, 3rd edit.)

**Q.**—A debtor dies insolvent, leaving assets. His executors refuse to prove his will. What steps should be taken in the interests of the creditors to enforce the due administration of the estate?

**A.**—The executors and residuary legatee (if any) should be cited in the Probate Division, to take probate; and if they refuse to do so, administration with the will annexed will be granted to the creditor: (see generally Coote's Probate Pract. p. 50, *et seq.*, 5th edit.)

**Q.**—State the cases in which it is advisable to administer the estate of a deceased person under a judgment of the court, and the effect of a judgment for that purpose with reference to these cases.

**A.**—It is advisable to do so in all cases of doubt, or where it is apprehended that certain creditors will obtain priority or harass the executors by litigation. So, where equitable assets are to be administered, or the assets require marshalling. When a judgment is made in the cause, the creditors are all creditors on equality, and an order may be obtained staying proceedings in any other division; such order must be obtained in such other division: (see No. LXXXVI. Bitt. Prac. Cas.; St. Eq. § 549; Sm. Man. sect. 467, &c.; and see the 22 & 23 Vict. c. 35, s. 30, *et ante*, p. 448.) By Order LV., r. 3, an originating summons may be issued to which particular questions may be determined without a general administration: (see note, *ante*, p. 462.)

**Q.**—Give an outline of the ordinary proceedings in an action by executors for administration of their testator's estate.

**A.**—In case of real estate, writ in the Chancery Division of the High Court. Service. Appearance. Statement of Claim. Statement of Defence. Replication. Interrogatories where necessary. Notice of trial. Evidence *viva voce* at the hearing. Judgment directing the usual accounts and inquiries to be taken at chambers. Summons to proceed thereon. Chief clerk's certificate. Setting down for hearing on further consideration. Final judgment thereon, directing taxation of costs, payment of creditors, and distribution of the estate.

**Q.**—May an executor issue a writ before he has obtained probate? And if so, in what stage of the action must he obtain it?

**A.**—He may do so; but he must obtain it before judgment: (Seton on Decrees, 46, 2nd edit.)

**Q.**—Explain the difference between legal and equitable assets, and state how each are administered amongst creditors.

**A.**—Legal assets are property which creditors might formerly make available in a court of law for the payment of debts, having devolved upon the executor or administrator by virtue of his office. Equitable assets are property which creditors could formerly only make available in a court of equity for payment of debts simply by virtue of an express dis-

position of the property, which must have been carried into effect by a court of equity. Legal assets, even in equity, were (subject to the 32 & 33 Vict. c. 46) administered according to their legal priorities. (a) But equity assets, with the exception of antecedent lines and charges *in rem*, were administered *pari passu*, without regard to the priority of debts: (Sm. Man. sect. 471; *Silk v. Prime*, 2 L. O. Eq. 88, in notes, 2nd edit.)

Q.—What is the order in which, under a judgment, assets of various descriptions are administered for the payment of debts?

A.—1. The general personal estate. 2. Any estates particularly devised simply for the payment of debts. 3. Estates descended. 4. Estates devised to particular devisees, but charged with the payment of debts. 5. General legacies. 6. Residuary devises and specific legacies and devises. 7. Property over which a testator has a general power and appoints by will. 8. Paraphernalia of widow: (Sm. Man. sect. 475; *Silk v. Prime*, 2 L. O. Eq. 102, in notes, 2nd edit.; Snell, Eq. 269, 4th edit.) (b)

Q.—What are the general rules under which the assets of a deceased intestate are administered with reference to the following classes of assets, viz., pure personalty, leaseholds, realty in mortgage, and realty, not mortgaged?

A.—The pure personalty and the leaseholds are equally liable to the payment of debts. The real estate and realty in mortgage (after satisfying the mortgage debts) are applicable to the payment of debts, but not till the personal estate has been exhausted. If the realty in mortgage is not sufficient to discharge the incumbrance, the personalty is liable to make up the deficiency: (Sm. Man. sect. 475; 17 & 18 Vict. c. 113.)

Q.—The same question with reference to the following classes of persons, viz., simple contract creditors, Crown creditors, judgment creditors, landlords, specialty creditors, mortgage creditors, next of kin, and heir-at-law?

A.—As to equitable assets, see *supra*; as to legal assets, the creditors will rank in the following order: 1. The Crown by record or specialty. 2. Judgment creditors (but these, under 23 & 24 Vict. c. 38, must be registered or re-registered within five years before the death). 3. Simple contract creditors, landlords (subject to their right of distress), and specialty creditors (32 & 33 Vict. c. 46). The mortgage creditors are of

(a) When the assets are legal, debts are paid in the following order: 1. Reasonable funeral and testamentary expenses. 2. Debts of record due to the Crown. 3. Debts due to the Post-office up to 5*l.*, or from the deceased as overseer. 4. Debts due on registered judgments and decrees. 5. Debts due on recognisances. 6. Specialty debts, arrears of rents and debts on simple contracts: (Matt. Exors. 157-168, 2nd edit.; 32 & 33 Vict. c. 46.)

(b) But although the personal estate is the primary fund for the payment of debts, still it may be exonerated either by express words or a plain intention of the testator, or where the debt, charge, or incumbrance is in its own nature real, or be a mortgage debt. Also, where the debt was contracted, not by the person who died last seised or entitled, but some other person from whom he took it by descent, or from whom he purchased it, or from whom his vendor derived it: (see St. Eq. §§ 571-576, 1003; *Ancaster v. Mayer*, 1 L. O. Eq. 505, 2nd edit.)



course entitled to realise their securities, and will rank as specialty creditors for any deficiency. The next of kin must abate before the heir-at-law except with respect to mortgage debts coming within the 17 & 18 Vict. c. 113.

*Q.*—Where an executor finds that he has not sufficient funds from the estate to satisfy all the creditors, may he pay any one creditor or class of creditors in preference to others? Does the circumstance of any creditor having issued a writ for administration of the estate make any difference? And does the Judicature Act contain any, and what, provision with reference to the administration of the estate of deceased persons?

*A.*—With respect to legal assets, the executor must pay the different classes of creditors according to their priorities, but he may pay any one creditor of a class in preference to others of that class, and specialty and simple contract creditors now rank together: (32 & 33 Vict. c. 46.) The mere issuing a writ for administration will not prevent the executor giving priority to a creditor who sues him and obtains judgment before judgment is actually obtained in the first action: (see *Matt. Exors.*, 2nd edit., p. 172.)

By sect. 10 of the 1875 Act, with regard to the administration *by the court* of the assets of any person dying after the commencement of the Act, and whose estate is insufficient to pay his debts and liabilities, the rule in bankruptcy as to administration is to apply, so far as regards proof of debts and valuation of annuities and liabilities.

*Q.*—Prior to the Judicature Act the rule that prevailed in Chancery as to the rights of secured and unsecured creditors in the administration of the estate of a deceased person whose assets were insufficient for payment of his debts in full, was different from the rule in bankruptcy. In what respect did these rules differ? and which rule is in future to be adopted in administering the assets of a deceased insolvent?

*A.*—Formerly in Chancery the secured creditor could prove for the whole amount of his debt, whilst in bankruptcy he must either realise his security, or value it and prove for the balance only. By sect. 10 of the 1875 Act, the rule in bankruptcy is now to prevail.

*Q.*—A person dies indebted to a company, registered under the Companies Act, 1862, for calls upon shares held by him. In the administration of his assets, has the company any priority over any, and which, of his other debts?

*A.*—The claim for calls is, by the Joint-Stock Companies Act of 1862, a specialty debt due from the deceased (ss. 75, 105); and before the 32 & 33 Vict. c. 46, would have had priority over his simple contract debts, but such priority is now taken away by this Act.

*Q.*—What is meant by the adjustment between creditors and legatees and between debtor and creditors, made by equity, and commonly called marshalling of assets?

*A.*—It is such an arrangement of the different funds of the common debtor of two or more creditors or claimants as may satisfy every claim, so far as, without injustice, this can be done, notwithstanding the claims of particular individuals to prior satisfaction out of some one or more of such funds. Thus, if creditors exhaust the personal estate, legatees, not being

residuary or charitable legatees, are allowed to go against real estate descended: (Sm. Man. sect. 494; *Aldrich v. Cooper*, 2 L. O. Eq. 56, 2nd edit.)

Q.—What is understood by marshalling of assets, and how is it distinguished from marshalling of securities?

A.—Marshalling assets is as above stated, while marshalling securities is the right of a creditor, who has a lien on or interest in a fund on which another creditor, who has also a charge upon another fund, has also a lien, if the claims of both creditors cannot be satisfied out of the common fund, to compel the latter to resort to the other fund in the first instance for satisfaction, unless that would operate to the prejudice of the party entitled to the double fund of the common debtor.

Q.—Where one party has a charge on freehold and copyhold estate, and another party a charge on the freehold only, what would be the rights of the latter as regards the satisfaction of the charge of the former?

A.—He has a right to have the securities marshalled as above stated.

Q.—Blackacre of the value of 10,000*l.*, and Whiteacre of 5000*l.*, are mortgaged to A. to secure 7500*l.* B. has a second mortgage on Blackacre alone to secure 5000*l.* Will equity aid B. to compel A. to realise his security in part against Whiteacre, and how?

A.—Yes; equity will marshal these securities in favour of B., if this will not operate to the prejudice of A.'s rights, or control his remedies: (*Greenwood v. Taylor*, 1 R. & M. 185; *Barnes v. Rackster*, 1 Y. & O. 401; St. Eq. § 633.)

Q.—A trader dies seised of real estate, and which he has devised by his will, but not thereby charged with the payment of his debts, and which estate would be assets in the hands of the heir for the payment of specialty debts. Can simple contract creditors obtain any, and what, assistance from equity in discharge of such simple contract debts, and under what authority? (a)

A.—By the statute 3 & 4 Will. 4, c. 104, all estates in fee simple (including copyhold estates), which the owner shall not by his will have charged with the payment of his debts, are now liable to be administered in equity for the payment of all the just debts of the deceased owner, as well debts on simple contract as on specialty. And there is now apparently no preference given to creditors by specialty contract in which the heir is bound; since specialty creditors and simple contract creditors are to be paid alike by 32 & 33 Vict. c. 46.

Q.—A testator, by his will, charges his real estate with the payment of an annuity, and the legacies given by his will. The personal estate is absorbed, and the real estate is insufficient to keep down the payments of the annuity. What is the effect upon the annuity and legacies under these circumstances?

A.—The annuity will, it seems, have priority over the legacies, for it here falls under the denomination of a demonstrative legacy; and, though

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(a) Also asked thus: To what extent can equity relieve creditors by or out of the copyhold property of persons dying seised of such property, and which persons shall not have charged such property with the payment of their debts?

not a specific legacy, it is so far of the nature of one that it will not be obliged to abate with general legacies : (see *Matt. Exors.* 209, 2nd edit. ; *Wms. Exors.* 695, 4th edit.) And the court may order so much of the estate to be sold as is required to answer the deficiency : (*Brayne v. Reeds*, 15 L. T. Rep. N. S. 349.)

**Q.**—Where there are specialty, simple contract and judgment creditors of a deceased person, are any of them, in the event of a deficiency, entitled to a priority of payment ? And if so, state the priorities.

**A.**—If the assets are legal, and the deceased died before 1st November, 1875, the judgment will, if registered or re-registered within five years before the death of the testator or intestate, be entitled to be paid first (see 23 & 24 Vict. c. 38, s. 3 ; *Walter v. Turner*, 9 L. T. Rep. N. S. 756 ; *Kemp v. Waddingham*, 13 *ib.* 709) (a); the creditors by specialty and simple contract now stand in an equal degree, and are paid without any preference (32 & 33 Vict. c. 46); but if deceased died on or after 1st November, 1875, the rule in bankruptcy, which gives no preference to judgments, prevails : (1875 Judicature Act, s. 10.)

**Q.**—Explain the mode of administering an insolvent estate, as between specialty and simple contract creditors, where the assets are partly legal and partly equitable.

**A.**—Formerly in such a case, although equity could not take away the legal preference on legal assets, yet if one creditor had been partly paid out of such legal assets, when satisfaction came to be made out of equitable assets, the court would have postponed him until there was an equality in satisfaction to all the other creditors out of the equitable assets proportionable to so much as the legal creditor had been satisfied out of the legal assets : (*Wms. Exors.* 1323, 3rd edit.) But now specialty and simple contract creditors rank equally, and are so paid out of the assets, whether legal or equitable : (32 & 33 Vict. c. 46.) Secured creditors can now only prove for the balance unsecured : (1875 Act, s. 10.)

**Q.**—In the ordinary administration of an estate in Chancery, in what class are voluntary deeds of gift or bonds payable, before or after legacies, or *pari passu* with them ? Give the reasons for your answer.

**A.**—A voluntary instrument, although effecting no transfer of property, which creates a valid legal obligation, will have effect given to it in equity, and the debt created thereby will be allowed to be proved against the assets of the deceased, and will rank before legacies, but will be postponed to all debts : (see *Ellison v. Ellison*, 1 L. O. Eq. 257, *in notis*, 3rd edit.) (b)

**Q.**—Suppose A. and B. both issue writs to have the estate of C.

(a) This section only applies to judgments against the deceased, and not to those entered up against his executors or administrators : (*Jennings v. Rigby*, 9 L. T. Rep. N. S. 303.)

(b) A creditor under a voluntary *post obit* bond is as much entitled to the benefit of the statute 13 Eliz. c. 5, as any other creditor. And where a testator having executed a voluntary *post obit* bond for securing an annuity of 100*l.* to his daughter-in-law for her life, afterwards made a voluntary settlement from and after his decease in favour of his widow and child, comprising all his property, except about 300*l.*, the settlement was held void under the statute as against the bond creditor : (*Adames v. Hallett*, L. Rep. 6 Eq. 468.)

administered by the court, which is entitled to priority; and how and upon what terms is the one entitled to stay proceedings in the other action?

A.—The one who obtains a judgment first will be entitled to priority; and the court will stay the proceedings in the other action until further order, giving liberty to apply, and reserve the question of costs. But if the writ in this action should pray for further relief than can be had in the first, the court will not stay the proceedings in it: (see *Ayck. Pr.* 340, 9th edit.; *Hall. Suit.* 82, 83; and *Campbell v. Hoskins*, 10 L. T. Rep. N. S. 93.) The plaintiff in the suit stayed may, however, apply to have the conduct of the one in which judgment has been obtained: (*Zambaco v. Cassavetti*, L. Rep. 11 Ex. 439.)

Q.—Can a creditor prove his debt in a creditor's suit after the chief clerk has made his certificate? If he can, explain how and under what circumstances.

A.—After certificate the creditor can only prove his debt by special leave of the court obtained on petition; and the court will only give permission on the terms of the applicant paying all costs incurred: (*Sm. Pr.* 971, 7th edit.)

Q.—Is a creditor whose debt does not, by law, carry interest, entitled to any, and if any what, interest on such debt when established under a judgment or order in a suit; and, if so, under what circumstances?

A.—He is entitled to interest upon his debt, at the rate of 4 per cent., from the date of the judgment or order, out of any assets which may remain after satisfying the costs of the cause or matter, the debts established, and the interest of such debts as by law carry interest: (*Ord. LV.*, r. 63; *Evans' Ch. Pr.* 30.)

Q.—A person conveys his estate to trustees upon trust to sell, and apply the proceeds of the sale in discharge of his bond debts, and the interest then due and to grow due thereon up to the day of payment. Upon taking the account it is found that the principal and interest upon some of them exceed the penalty of the bond. In this case are the obligees entitled to the excess? If not, state the reason why.

A.—They are not; as the penalties are inserted merely to secure the payment of the principal and interest. But if the obligor has by unfounded and protracted litigation prevented the obligees from prosecuting their claims it would be otherwise: (*St. Eq. ss.* 1313, 1316, a.)

Q.—A. bequeaths a legacy to B. for life, and after his death to B.'s next of kin. B. dies, leaving a widow, a mother, and a sister: who is entitled to the legacy, and in what proportions, and why?

A.—B.'s mother will take the whole legacy in exclusion of both the widow and sister. Because "next of kin," without reference to the Statute of Distributions, means the *nearest* of kin only, the one person of several next of kin who is the nearest related. A wife cannot take as *next of kin* to her husband: (see *Wms. Exors.* 1005, &c., 3rd edit.; *Lee v. Lee*, 2 L. T. Rep. N. S. 532.)

Q.—A., by will, bequeaths 10,000*l.* to "the heir of the late B." Who will take under this bequest, assuming that there is nothing in the context of the will to explain the words?

A.—It seems that the person who is the heir of B. at the death of the testator will take the 10,000*l.* For here the word "heir" is used to describe a legatee, and not as a word of succession or substitution: and there is nothing in the context of the will to take it out of its ordinary meaning: (Wms. Exors. 888, 3rd edit.; *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524.)

Q.—What is the effect of a bequest of residuary personal estate (1) "To my friends and relations," (2) "To my near relations," (3) "To my nearest relations," (4) "To my poor relations," and (5) "To the most necessitous of my relations?"

A.—Although the cases are somewhat conflicting, it may be stated that in the instances numbered 1, 2, 4, and 5, the testator's next of kin, according to the Statute of Distributions, will take the residue, and the words "friends," "near," "poor," and "most necessitous" will not vary the gift to relations. But a gift (3) "to my nearest relations" will entitle the next of kin to take to the exclusion of those who under the statute would have been entitled by representation: thus, a brother would exclude a deceased brother's child: (2 Jarm. Wills, ch. 29; Lewin, Trusts. 538, n, &c., 4th edit.)

Q.—A., by will, appoints B. executor. B. dies, and by his will appoints C. executor. Does C., by accepting the office, become the representative of A., and is he bound to administer A.'s estate?

A.—Yes; C., by accepting office, becomes the representative of A., and is bound to administer A.'s estate: (*Brook v. Haynes*, L. Rep. 6 Eq. 25; Matt. Exors. 307, 2nd edit.) An executor cannot renounce probate of the first will and take probate of the second: (*Re Perry*, 2 Curt. 655; Coote's Prob. Pr. 192: 6th edit.)

Q.—Can an executor or administrator of a sole executor of A. B. sue for a debt due to A. B. in his lifetime, and if not, in either case, what step should be taken to enable somebody to sue?

A.—The executor of a sole executor of A. B. can sue for a debt due to A. B., but the administrator cannot. In this case administration *de bonis non* to A. B.'s estate must be first taken out.

Q.—When a sole or surviving executor dies intestate, how is a legal personal representative of the original testator constituted?

A.—By taking out administration *de bonis non*: (Matt. Exors. 306, 2nd edit.)

Q.—A married woman dies leaving her husband surviving her, and a *chose in action* not reduced into possession. The husband then dies intestate, without reducing it into possession. Does the *chose in action* belong beneficially to the husband's estate or to the wife's? Must any, and what, administrations be taken out?

A.—Eventually the *chose in action* would belong to the husband's estate, after paying any debts owing by the wife. Administration must be taken out to both estates by the husband's administrator, as the grant follows the interest: (see Coote's Practice, p. 81.)

Q.—State whether, in case of a deficiency of assets, specific legacies can be required to abate.

A.—On a deficiency of assets general legacies abate proportionably, but specific legacies only abate for payment of debts: (Matt. Exors. 180, 2nd edit.)

Q.—A testator gives a specific bequest to A., and directs that, in consideration of such bequest, A. shall pay his testator's debts, and makes A. his residuary legatee and executor. The debts far exceed the value of the bequest. Is A. bound to pay them in full or not? Give the reason for your answer.

A.—A. will be bound to pay the debts in full if he accepts the bequest; for, as to the specific legacy, he cannot take that without its burden: (St. Eq. § 1077); and as to the residue, he is not entitled to that until all the debts are paid: (Matt. Exors. 208, 2nd edit.)

Q.—A.'s will is in the following terms: "I give 5000*l.* to B., and the residue of my property to C." A. dies possessed of real estate worth 30,000*l.*, and personalty amounting to 10,000*l.*, but owing 15,000*l.* to creditors. What will B. take under the will?

A.—B. will take the 5000*l.*, which, by the will, is charged upon all the testator's property, for the rule is, where you find a legacy followed by a gift of the residue of real and personal estate, the word residue is intended to mean that out of which something given before has been taken, and the result is to charge the legacy on the residue: (*Gainsford v. Dunn*, L. Rep. 17 Eq. 405.)

Q.—In the case of an action to administer the estate of a deceased person who has left children entitled to legacies or the surplus of the estate, at what stage of it, and in what stage of the proceedings, can an order be obtained for the allowance for maintenance of the children?

A.—The court will not grant an order for maintenance until the action has been in chambers, and the chief clerk has certified that there is a clear surplus applicable for this purpose after paying costs of action, debts, and charges: (see hereon Ord. L., r. 9.)

Q.—State debts which must be ascertained and paid under a trust created by deed, and under a trust created by will.

A.—Under a trust created by deed the debts existing at the time of execution must be ascertained and paid while under a trust created by will only those due at death are to be regarded. Statute barred debts will not be revived by the trust unless there is a clear intention that they should, and where a trust for payment of debts is created by will of personal estate only, the Statutes of Limitation run against the creditors: (Snell, 266, 5th edit.)

Q.—Under what circumstances, other than an express trust or power for that purpose, can a devisee in trust now raise money for the payment of a testator's debts and legacies?

A.—Where a testator (since Aug. 13, 1859) by his will charges his real estate or any part of it with the payment of his debts or legacies, &c., and devises the whole estate so charged to trustees, and makes no express provision for raising such debts or legacies, &c., out of the estate, the trustees or the survivors may raise such debts, &c., by a sale or mortgage of the estate: (22 & 23 Vict. c. 35, ss. 14, 15.)



Q.—If an annuitant under a will dies before the day of payment, is any portion of the annuity payable in that case, and under what authority?

A.—The annuity (not being for life merely) would have been apportioned so that his representatives would be entitled to a proportion thereof according to the time which has elapsed from the commencement or last period of payment (as the case may be), under the authority of the statute 4 & 5 Will. 4, c. 22: (see Hayes & Jarm. Conc. Wills, 146-148, 6th edit.) But now all annuities, &c., are apportionable under the 33 & 34 Vict. c. 35, s. 1: (*ante*, p. 256.)

Q.—Is an executor liable for losses arising from acts unauthorised by the will creating the trust; is he chargeable with profits made by him in like manner, or with interest only?

A.—He is liable to make good the loss and to account for all profit, and not for the interest merely. Nor can he set off the profit against the loss: (Sm. Man. tit. 2, ch. 7; Matt. Exors. 311, &c., 2nd edit.)

Q.—What liability is incurred, in his personal and representative character respectively, by an executor who carries on the business of his testator under a direction in the will?

A.—The executor will be liable for the debts as fully as if he were carrying on the trade for his own benefit, but so much only of the estate of the testator will be liable to such debts as he may have directed to be employed in the business: (Wms. P. P. Chapter on Joint Ownership.)

Q.—Can an executor be charged with wilful default on an administration summons?

A.—No; the only order made on summons is the common order for administration and account. For other purposes a writ must be issued: (*Partington v. Reynolds*, 4 Drew. 253; Evans' Ch. Pr. 32.)

Q.—Is an executor allowed his reasonable expenses out of the trust fund?

A.—Yes; unless incurred by his wilful default, but nothing for personal trouble and loss of time: (Matt. Exors. 319, 2nd edit.; *Robinson v. Pett*, 2 L. C. Eq. 206, 2nd edit.)

Q.—If an executor be sued by a simple contract creditor of his testator, and he has notice of a specialty debt, but has not assets sufficient to pay both debts, what is the proper course for the executor to take?

A.—If the assets to be administered were legal, the specialty debt, being of a higher nature than the simple contract debt, was formerly entitled to priority, and the executor should, in a case like that given, have pleaded the debt of a higher nature to the action by the simple contract creditor, or he would have had to pay both: (see Matt. Exors. 154, 2nd edit.) But now specialty and simple contract creditors rank equally (32 & 33 Vict. c. 46), and the executor can give either priority.

Q.—State in what respect recent legislation has affected the previous liability of an executor to the creditors of his testator in respect of debts of which he had no notice before he had paid all the debts of which he

had notice, and had distributed the residue of the estate among the residuary legatees. (a)

A.—The 22 & 23 Vict. c. 35, enacts that where an executor or administrator has given such notice as would have been given by the court in an administration suit for creditors and others to send in their claims against the estate of the deceased, the executor or administrator may, on the expiration of the time named in the notices, distribute the assets among the parties entitled, first paying the debts of which he has notice; he is then freed from responsibility as to claims of which he had no notice. Creditors and claimants may, however, still, as heretofore, follow the assets in the hands of legatees: (sect. 29; *Clegg v. Rowland*, 15 L. T. Rep. N. S. 385.)

Q.—Legacies are given to a testator's children, some of whom have married since the date of the will but in their father's lifetime. State any point to be borne in mind in advising the executor as to payment.

A.—Inquiry should be made whether there has been any settlement on the marriages affecting the legacies either by way of satisfaction or arrangement to settle, and if the legacy to any married daughter does not exceed 200*l.*, if she has married since 7th August, 1870, as it will then belong to her for her separate use, and her receipt alone will be a good discharge for payment of same: (33 & 34 Vict. c. 93.) If the legacy exceeds 200*l.* the executor should inquire of the wife whether she wishes to enforce her equity to a settlement before paying it over to her husband. And, by 45 & 46 Vict. c. 75, if married since 1882, the wife's receipt alone will be sufficient whatever the amount.

Q.—A creditor has omitted to take the necessary proceedings for recovering his debt from the executor or administrator, who has relieved himself from responsibility. Can the creditor recover his debt? If so, from whom?

A.—The creditor may, nevertheless, recover his debt, not being statute barred, from the legatees or next of kin; and equity will compel them to refund: (*Nelthorp v. Hill*, 1 O. C. 189; 22 & 23 Vict. c. 35, s. 29.)

Q.—Is an executor justified in paying a simple contract debt before a specialty debt, or one simple contract or specialty debt before another simple contract or specialty debt?

A.—The executor must have paid the debts according to their priority: for, if he paid those of a lower degree without leaving enough to satisfy those of a higher, he would have to pay the latter out of his own estate. But among creditors of equal degree he might pay one debt in preference to another; specialty debts have now no priority: (Matt. Exors. 153, 171, 2nd edit.; see 32 & 33 Vict. c. 46, *supra*.)

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(a) This question may be answered from the above: An executor has advertised for the creditors of his testator; has paid all debts of which he had notice, and those are by simple contract; and he has distributed the residue among the legatees without any judgment having been made for the administration of the estate. Afterwards a specialty creditor, of whose debt he had no notice or knowledge, issues a writ for the administration of the estate. In taking the account is the executor entitled to take credit for the payments made to simple contract creditors, and to the legatees, or to either and which of them?

**Q.**—What becomes of the undisposed-of residue of a testator's personal estate, when the executors are appointed without any express bequest? Will equity look through the will for expressions to show that it was or was not intended to go to the executors beneficially?

**A.**—Such residue, since the 1 Will. 4, c. 40, is held by the executors as trustees for the next of kin of the testator, unless it appears by the will that the executors are to take beneficially. The court is bound by expressions in the will, but will, in looking through it, do all in its power to exclude the executors: (Hayes & Jarm. Conc. Wills, 186, 187, 6th edit.)

**Q.**—What relief does equity give to a legatee when the executor withholds payment of the legacy; and what takes place if the executor does not admit assets?

**A.**—On the legatee applying to the court the executor will be ordered to pay the legacy (and perhaps interest, see *infra*) and administer the estate. If the executor does not admit assets, equity will compel a discovery and account: (see St. Eq. §§ 534, 535, 591-593, 602; Matt. Exors. 316, 2nd edit.)

**Q.**—If an executor improperly retains large balances of his testator's estate in his hands, what remedy will equity afford against such executor?

**A.**—If, after a year from the testator's death, the executor retains money in his hands lying dead, without apparent reason, he will be chargeable with 4l. per cent. interest on the fund so retained: (see Matt. Exors. 318, 2nd edit; *Saltmarsh v. Barrett*, 7 L. T. Rep. N. S. 87.) And equity will, if necessary, compel the executor to discover and account for the assets and their application: (see Matt. Exors. 316, 2nd edit.)

**Q.**—A. by his will gives to charitable uses the residue of his property, consisting of consols, railway shares, a share in the New River Company, shares in various insurance and dock companies, long leaseholds for years and leaseholds for lives, a common money bond, and arrears of rent. Are any of these gifts void, and why? And who is entitled to the benefit of such portions of the said property as do not pass to the charitable uses? (a)

**A.**—The 9 Geo. 2, c. 36, prevents gifts of *land*, &c., or money to *purchase land* for charitable uses, to be made by will or otherwise than in the way therein mentioned.

Leaseholds are within the Act, as are shares in the New River Company, and a gift of them by will to charitable uses is void: (Wms. Exors. 848, *et seq.*)

As to railway shares, the gift would, unless the Act or charter incorporating the company expressly declares the shares to be real estate (*Edwards v. Hall*, 25 L. J. 82, Ch.; 4 W. R. 111), be good; so would the gift of consols, shares in the insurance and dock companies, the common money bond, and arrears of rent.

The void gift of the leaseholds for years will go to the next of kin or residuary legatee, but the leaseholds for lives will go to the heir as special

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(a) Also asked in the Conveyancing Division.

occupant, if there be one, but if no special occupant, to the next of kin, or residuary legatee; the New River shares devolve on the heir-at-law, or lapse to the residuary devisee, if one: (see *Wms. Exors.* 848, 862, 3rd edit.; 1 Vict. c. 26.)

*Q.*—A testatrix bequeaths a charitable legacy of 900*l.* and charges it on all her property, which consists of 6000*l.* realty, 4000*l.* mixed, and 2000*l.* pure personalty; what amount will the charity be entitled to receive, and on what principle?

*A.*—The charity will only be entitled to 150*l.*, i.e., a sixth part; for legacies to charities cannot be charged on land, or anything savouring of land, as a mixed fund; and equity will not marshal the assets in favour of charities; therefore such proportion of the legacy will fail as the prohibited portion of the testator's property (the 6000*l.* realty and 4000*l.* mixed) bears to the whole estate: (see *Williams v. Kershaw*, 1 Keen, 274, n.; *Attorney-General v. Southgate*, 12 Sim. 77.)

*Q.*—Is a bequest of consols to be applied in rebuilding a public hospital or parsonage-house valid? Give the reasons for your answer.

*A.*—The bequest is good, as no fresh land is brought into mortmain: (*Attorney-General v. Parsons*, 8 Ves. 186; *Hayes & Jarm. Conc. Wills*, 351, 6th edit.)

*Q.*—What is meant by the *cy près* doctrine? And state examples of its application?

*A.*—Where a literal compliance with the directions of a testator becomes inexpedient or impracticable the court will execute them as nearly as it can according to the original purposes, or (as the technical expression is) *cy près*; for example, when a bequest is made for charitable purposes, but the special mode of application is impracticable, the court will execute it as nearly as it can; or if a gift is made by will to the sons of an unborn person after a life estate to such person, the court will give the unborn person an estate tail: (*Will. R. P.* 278, 13th edit.)

*Q.*—Where there is a bequest for charitable purposes, but the special mode of application is impracticable, will the court carry the bequest into effect in any, and what manner?

*A.*—The court will execute it as nearly as it can according to the original purpose, or (as it is technically termed) *cy près*; unless the special mode of application appears to have been the exclusive object of the giver: (*St. Eq.* §§ 1169-1172.)

*Q.*—Will equity sustain a bequest of money to executors to build almshouses or a hospital in case any person should, within a limited time, purchase or give land as a site? What law was supposed to stand in the way of such a bequest, and what is now the established doctrine as to this?

*A.*—The court will sustain such a bequest: (*Philpot v. St. George's Hospital*; *Attorney-General v. Philpot*, 30 L. T. Rep. N. S. 15.) It was originally held that such a bequest was bad, as tending to bring fresh land into mortmain. But the established doctrine now is, that if the testator directs that the land should be procured from any person who

will give it without reward, and dedicate it to the charity, the bequest is good: (*Ib.*)

Q.—If a testator devises real estate to A., and by an unattested writing communicated to A. after the testator's death informs A. that the testator has made the devise in full confidence that A. would devote the real estate to charitable uses, will equity permit A. to retain the estate for his own use?

A.—Yes; for the 9 Geo. 2, c. 36, protects him against the claims of the charity, and the 29 Car. 2, c. 3, and 1 Vict. c. 26, s. 9, against the claims of the heir of the testator: (*Adlington v. Cann*, 3 Atk. 14; *Lewin on Trusts*, 48, 4th edit.; 1 Jarm. Wills, 207.)

Q.—What rule is applicable to the succession or devolution of real or personal estate when the domicile is not English?

A.—The succession to or devolution of personal property, including leaseholds for years, is governed by the *lex domicilii*: that to realty by the *lex loci rei sitæ*: (*Hayes & Jarm. Conc. Wills*, 22, 35, 6th edit.; *Sm. Man.* sect. 56; and see 24 & 25 Vict. cc. 114 and 121; and *Freke v. Lord Carbery*, L. Rep. 16 Eq. 461.)

Q.—What is domicile? Give examples of cases in which the right to property may be governed by a question of domicile.

A.—Domicile is defined by Lord Westbury, in *Udny v. Udny* (L. Rep. 1 H. L. Sc. 441), to be “a residence freely chosen, and not prescribed or dictated by any external necessity, and it must be residence fixed, not for a limited period or for a particular purpose, but generally, and indefinite in its future contemplation.” The right to personal property is governed by the domicile of the deceased. For example: where an executor or administrator collects assets in a foreign country, without any letters of administration taken out or actual administration accounted for in such foreign country, and brings them home, they will be treated as personal assets, to be administered here under the domestic administration: (see *Wms. P. P.* p. 365, 10th edit.; *Sm. Man.* sect. 501.)

Q.—Can an executor by any, and what, means give priority to one creditor of his testator over others after a writ has been issued to administer the estate?

A.—Even after a writ for administration has been issued it seems an executor may give priority to a creditor who sues him and obtains a judgment before a judgment is actually obtained in the first action: (see *Matt. Exors.* 172, 2nd edit.) And it has been decided that the creditor is not to be restrained from issuing execution upon his judgment even after a judgment for administration has been made: (*Fowler v. Roberts*, 2 L. T. Rep. N. S. 368; *Vincent v. Godson*, 3 De G. & S. 714, overruling *Clark v. Ormond*, Jac. 123.)

Q.—If a testator by his will charges his real estates with the payment of his debts, will or will not such a devise have any, and if any, what, effect on a debt which had been previously barred by the Statute of Limitations.

A.—It will have no effect, as debts actually barred by the Statute of

Limitations are not included in a trust for payment of debts : (Sm. Man. sect. 474 ; *Burke v. Jones*, 2 V. & B. 275.)

Q.—Is an executor justified in paying a debt of his testator which is barred by the Statute of Limitations ?

A.—Yes ; as it has been held that he is not bound by, and cannot be compelled to plead the statute : (see *Wms. Exors.* 1535, 4th edit. ; *Sharman v. Rudd*, 31 L. T. Rep. 325 ; *Hill v. Walker*, 32 *ib.* 71 ; *Adams v. Waller*, 14 *ib.* N. S. 727.)

Q.—State under what circumstances a plea of the Statute of Limitations will not be available, when the existence of a claim has not been acknowledged in writing within six years.

A.—It will not be available in any claim of a *cestui que trust* against his trustee, for any property held on an express trust or in respect of any breach of such trust (1873 Act, s. 25, r. 2), or where there has been payment made in respect of such claim within the six years.

Q.—Has an executor, who is a creditor of his testator, any advantage over other creditors ?

A.—Yes, he may retain his own debt out of the legal assets in preference to other creditors, even if his own debt be statute barred : (*Sharman v. Rudd*, *sup.* ; *Matt. Exors.* 155, 2nd edit. ; *Snell, Eq.* 5th edit. 283.)

Q.—Under the usual judgment for the administration of an estate, is an executor or administrator entitled to retain a debt due to himself, in preference to other creditors of an equal degree ? (a)

A.—Yes ; notwithstanding the assets out of which he seeks to retain his debt came to his hands after the judgment : (see *Nunn v. Barlow*, 1 Sim. & Stu. 588 ; *Alln. Wills & Adms.* 295, 3rd edit. ; *Matt. Exors.* 155, 2nd edit.)

Q.—In what way does the issuing of a writ for the administration of a testator's estate affect the executor's right to deal with the assets ?

A.—The mere issuing of a writ does not deprive the executor of all power over the assets, but, as a judgment on a creditor's writ for administration of assets, being for the benefit of all the creditors, makes them all creditors by judgment upon an equality, and precludes from the time of such judgment all *voluntary* preference by the executor in favour of any of them. But, as above stated, a creditor who has obtained a judgment previously may execute it after : (*Fowler v. Roberts*, 2 L. T. Rep. N. S. 368 ; *St. Eq.* §§ 456, 547, 549.)

Q.—In respect of what species of property are probate duty, legacy duty, and succession duty respectively payable ?

A.—Probate duty is payable on all goods, chattels, and credits locally situate in this country, securities of foreign countries which are payable to bearer and transferable by delivery only, personalty appointed by will under a general power, money secured on heritable property and by heritable bonds in Scotland, and any interest which accrued between the death

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(a) Also asked thus : Can a creditor who is appointed executor retain his own debt in preference to other creditors of equal degree ?



and the grant: (Hayes & Jarm. Conc. Wills, 596, 6th edit.) Also on British ships at sea at the death, registered at a port in the United Kingdom. Unless in any case the effects do not exceed 100*l.*: (27 & 28 Vict. c. 56, ss. 4, 5.) (a)

Legacy duty is payable on all the testator's personal property in whatever part of the world situate if the testator was domiciled in England, unless it be exempted from duty, as when given to the deceased's wife, or his descendants, when the probate duty covers the 1 per cent. rate, or where the whole estate is under 300*l.*, when the probate duty of 30*s.* only is payable, or where the whole estate is under 100*l.*: (43 Vict. c. 14; 44 Vict. c. 12.)

As to succession duty, see *ante*, p. 320.

Q.—Where an executor has paid a legacy without deducting or paying legacy duty thereon, what are the respective liabilities of executor or legatee in respect of such duty?

A.—By 36 Geo. 3, c. 52, in such a case the duty becomes a debt due from each of them to the Crown, but if the executor pays it he has a right to be recouped by the legatee unless the legacy was given free of duty. A penalty of 10*l.* per cent. on the amount of duty is incurred if not paid within twenty-one days after payment of legacy, and if not paid within three months a penalty of 10*l.* per cent. on the legacy.

Q.—Does legacy duty attach under any, and if so what, circumstances to real estate?

A.—Duty is payable on every legacy, specific or pecuniary, or of any other description of the value of 20*l.* or upwards given by any will or testamentary instrument of any person dying after the 5th April, 1805, out of or charged upon his or her real or heritable estate or out of any moneys to arise by sale or mortgage of such estate; also for the clear residue (when given to one person) and for every share of the clear residue (in other cases) of the moneys to arise from the sale, &c., of real estate directed to be sold or otherwise disposed of by the will of any person dying after 5th April, 1805, when such residue or share exceeds 20*l.*, and the same is paid in after 31st August, 1815: (55 Geo. 3, c. 184, schedule). But see now sect. 42 of 44 Vict. c. 12 (Customs and Inland Revenue Act, 1881), which makes duty payable on legacies not amounting to 20*l.* which are not subject to the relief given by section 13 of the Customs and Inland Revenue Act, 1880, *i.e.*, on account of the value of the whole of the personal estate being less than 100*l.*

Q.—A testator dies possessed of freeholds, also of leaseholds, some subject to a mortgage; also of consols, foreign bonds, some transferable abroad, and some payable to bearer; also of a balance at his bankers here and in India. State how you would arrange these assets for probate here.

A.—The probate duty is payable on the leaseholds, the mortgage money upon them being first deducted (31 & 32 Vict. c. 124), the consols, and

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(a) Where leaseholds are included in any probate or administration, any mortgages upon them may be deducted from the value before payment of the duties: (31 & 32 Vict. c. 124.)

such part of the foreign bonds as are payable to bearer, and on the bankers' balance in this country.

### POINTS RELATING TO MORTGAGES.

*Question.*—What is the meaning of the maxim “once a mortgage always a mortgage?” and by what test is a proviso for repurchase by a vendor distinguished from a mortgage?

*Answer.*—This maxim means that the equity of redemption is such an inseparable incident to a mortgage that it cannot be defeated by stipulation or agreement: (*Howard v. Harris*, 2 L. O. Eq. 947, 3rd edit.)

If the consideration was grossly inadequate, or if the grantor kept possession, or paid the cost of the conveyance, &c., each is sufficient to show that the conveyance was intended as a mortgage, and not as an absolute sale, with a right of repurchase: (Sm. Man. sect. 507.) (a)

*Q.*—Explain the terms “mortgage,” “redemption,” “foreclosure,” “tacking,” “consolidation,” and “marshalling” of securities.

*A.*—“A mortgage” (*mortuum vadium*, i.e., dead pledge) is a conveyance, assignment, or demise of real or personal estate as security for the repayment of money borrowed.

“Redemption” is the buying back the mortgaged estate by the payment of the sum due on the mortgage.

“Foreclosure” is the forfeiture by the mortgagor of his equity of redemption by reason of his default in paying the amount due within the time fixed, in a suit instituted by the mortgagee for the purpose.

“Tacking” is the union of two incumbrances on the same property by the mortgagee who has the legal estate, so as to cut out an intermediate incumbrancer, of whom he had no notice at the time of making his subsequent advance.

“Consolidation” is where several mortgages, on different properties belonging to the same mortgagor, become united in the same mortgagee, which entitles him to resist redemption of one or more without the others. (b)

“Marshalling of securities” is the right of a creditor who has a lien on, or interest in, a fund on which another creditor, who has also a charge upon another fund, has also a lien, if the claims of both creditors cannot be satisfied out of the common fund, to compel the latter to resort to the other fund in the first instance for satisfaction, unless that would operate to the prejudice of the party entitled to the double fund, or the common debtor.

*Q.*—If a mortgage deed provides that interest shall be paid half-yearly at 4 per cent., and if not paid within thirty days then at 5 per cent., can the mortgagor having made default in paying interest afterwards redeem without paying the interest at 5 per cent.? Give reasons.

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(a) If a conveyance appear absolute on the face of it, what evidence will equity admit to show that it was intended as a security? (This question is answered in the text.)

(b) By 44 & 45 Vict. c. 41, s. 17, this right ceases where the deeds or one of them is made after the 31st Dec. 1881, unless a contrary intention is expressed.

A.—The stipulation for increasing the rate of interest is considered as a penalty and void, and will be relieved against in equity. The mortgagor can therefore redeem on paying the principal with interest at 4 per cent.: (Sm. Man. sect. 518.)

Q.—What is an equitable mortgage? In what respects is it objectionable as a security?

A.—An equitable mortgage was one that could be enforced in equity only. It was objectionable therefore on this account, for no ejectment could be brought, or possession obtained, or sale had, except by bill in equity: (*Matthews v. Goodday*, 5 L. T. Rep. N. S. 572.) Also because a subsequent mortgagee without notice who obtained the legal estate would prevail over the prior equitable mortgagee: (Sm. Man. sect. 596.) This danger of tacking still remains, and the remedy by writ is confined to the Chancery Division of the High Court: (1873 Act, s. 34, sub-s. 3.)

Q.—In what respect does an equitable differ from a legal mortgage; and are there any, and what, proceedings provided by equity for converting the equitable into a legal mortgage?

A.—A legal mortgage passes the entire legal interest in the subject-matter to the mortgagee, and the mortgagor has but an equity of redemption; whilst an equitable mortgage as above stated merely gives the mortgagee a right in equity to have a complete title. Equity will compel the equitable mortgagor (if he has agreed to do so) to grant a legal mortgage, or, if the equitable mortgage be created by deposit of deeds only, will order a foreclosure: (*Matthews v. Goodday*, 5 L. T. Rep. N. S. 572; *James v. James*, 42 L. J. Rep. 386.)

Q.—In what cases is notice essential to give effect to equitable mortgages?

A.—Notice is essential in equitable mortgages of personal property, or of *choses in action*; or of land devised in trust for sale, or rather the proceeds thereof: (*Consolidated Insurance Company v. Riley*, 1 L. T. Rep. N. S. 209; Sug. Conc. V. 275.)

Q.—If a *chose in action* be assigned absolutely or by way of mortgage, or is equitably charged, can the assignee, mortgagee, or incumbrancer sue in his own name for such *chose in action*, and under what conditions?

A.—In case of an *absolute* assignment in writing of a *chose in action*, the assignee may sue in his own name for its recovery, provided he has given written notice of the assignment to the debtor, trustee, or other persons, from whom the assignor would have been entitled to receive or claim it: (1873 Act, s. 25, sub-s. 6.)

Q.—Can an officer in the army or navy assign his future accruing pay, or a retired officer assign a pension given him for past services? State reasons?

A.—An assignment of accruing pay is invalid, as it is given for maintaining the dignity of the office and for securing the proper discharge of the duties thereof. It is otherwise in the case of an assignment of a pension for past services by a retired officer where no particular service is to be rendered to the public: (Smith's Principles, p. 313.)

Q.—What is the use of the usual "joint account clause" in a mortgage to trustees?

A.—That in the event of the death of one, the power to give a receipt for the mortgage money may be in the survivor, and that the representatives of the deceased may not be mixed up in the trust: (and see 44 & 45 Vict. c. 41, s. 61.)

Q.—A. insures his life for 1000*l.* and mortgages the policy to B. for 200*l.*, and dies without paying off the mortgage; who can give a valid discharge for the sum assured?

A.—If notice of the assignment to B. be given to the insurance office, by 30 & 31 Vict. c. 144, B. will be able to give a valid discharge for the amount, otherwise the personal representatives of A. must join to do so.

Q.—A. insures his life and mortgages the policy to B., the insurance office declares a bonus and gives the insured the option of taking the bonus either (1) by payment in present money; (2) by reduction of the annual premium; (3) by adding a reversionary sum payable on the death of the insured. Who can declare and receive the benefit of each of these options?

A.—In all well-drawn mortgages of policies, a power of attorney is inserted, authorising the mortgagee to exercise such option, and receive any cash payable, in which case it will go in reduction of principal; the assignment of the policy carries the bonuses unless a contrary intention appears; (2 Dav. Prec. 491.)

Q.—State accurately what dangers a mortgagee is exposed to who does not get the deeds relating to the property.

A.—If the mortgagee, through his own neglect, does not obtain the deeds, the mortgagor may, by concealing the mortgage, fraudulently obtain further advances or sell the estate, in which case the first mortgage will be postponed to the subsequent security: (see *Finch v. Shaw*, 19 Beav. 500.)

Q.—What relief does equity give where a mortgagee wishes to acquire an absolute title to a forfeited mortgage, and to foreclose all equity of redemption? (a)

A.—The relief given to the mortgagee is, permitting him to foreclose the equity of redemption, unless the mortgage money, together with interest and costs, be paid within the time given, or by ordering a sale. On the other hand, it allows the mortgagor to redeem the mortgaged premises if he applies to do so before the right is lost, and within the time allowed by the court for payment: (St. Eq. §§ 1013, 1016, 1028 a.)

Q.—Could a mortgagee proceed against the mortgagor both at law and in equity at the same time, and how?

A.—Yes; if a debt was secured by the mortgage of real estate, and also by covenant, and collaterally by bond, the mortgagee might pursue all his remedies at the same time: he might at the same time bring his ejectment, file his bill of foreclosure, and sue on the bond or covenant: (see Sm. Man. sect. 548; Coote Mort. 497, 3rd edit.)

Q.—What are the various remedies of a creditor for the recovery of his

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(a) Also asked thus: What relief does equity give where a mortgagor is desirous of redeeming a forfeited mortgage?

debt where he is mortgagee under an ordinary mortgage of freehold estate, and his debtor is dead?

A.—The creditor may enforce his power of sale and proceed against the estate for the deficiency, if any.

He may issue his writ for foreclosure.

He may sue on his covenant.

Or he may proceed to administer the estate.

It may be observed that it is only in case of an insolvent estate that sect. 10 of the 1875 Judicature Act applies; and see *ante*, p. 466.

Q.—The like where he is an equitable mortgagee by deposit of deeds, and where he is a simple contract creditor?

A.—An equitable mortgagee by deposit may proceed to foreclose: (*James v. James*, 42 L. J. Rep. 386.) Or, like the simple contract creditor, may sue the executor or administrator for his debt, or proceed to administer the estate by either writ or administration summons.

Q.—Describe the nature and object of a writ of foreclosure.

A.—It is a writ issued by a mortgagee, for the purpose of obtaining the direction of the court for payment of his principal money and interest and costs; or, in default, that the mortgagor may be foreclosed from his equity of redemption: (Ayck. Pr. 261, 9th edit.; Evans, Ch. Pr. 391.)

Q.—Who are the usual parties to a writ of foreclosure? Is the plaintiff, if a second mortgagee, obliged to join the first mortgagee? And what are the consequences of not doing so?

A.—Usually all persons interested in the mortgage money (but trustees may in some cases represent their *cestui que trust*), and the mortgagor or those claiming through him, and all incumbrancers subsequent to the mortgage. If a second mortgagee sues and does not make the first mortgagee a party, the rights of the latter remain unaltered; if the plaintiff make the first mortgagee a party the plaintiff must offer to redeem him.

Q.—Within what period must an action of foreclosure be brought? And what judgment is equity empowered by a modern statute to make in such an action?

A.—Formerly a foreclosure action must have been brought within twenty years from the time of the right accruing, or from the last payment of principal or interest: (7 Will. 4 & 1 Vict. c. 28.) Since 1st January, 1879, within twelve years: (37 & 38 Vict. c. 57.) The court may in a foreclosure action direct a sale instead of a foreclosure upon the application of the mortgagee or mortgagor, and impose terms: (see fully 44 & 45 Vict. c. 41, s. 25; *Whitbread v. Roberts*, 33 L. T. Rep. N. S. 24; Sm. Man. sect. 539.)

Q.—Writ by mortgagee against second mortgagee or mortgagor for foreclosure—what time has the second mortgagee to redeem, and if he redeems may he continue the action against the mortgagor, and for what purpose?

A.—The second mortgagee has six months from the date of the chief clerk's certificate to redeem. If he redeems he may continue the action to foreclose the mortgagor, and the judgment directs an account to be

taken of what is due to him, and for his costs of action to be taxed, and gives the mortgagor three months after the certificate thereof to redeem, and in default he is foreclosed : (Sm. Pr. 778, 7th edit.)

*Q.*—Under the usual judgment for foreclosure, is any, and what, time of payment allowed ?

*A.*—Yes, the usual time of payment allowed is six months after the date of the certificate of the chief clerk. And upon a fit case being made out, the court will enlarge the time appointed for payment of principal, interest, and costs : (Evans, Ch. Pr. 397.) But it seems the court is not bound to give six months to redeem : (*Newman v. Self*, 10 L. T. Rep. N. S. 152.)

*Q.*—Can a mortgagee be compelled to produce his mortgage deed to the mortgagor when the application is made *bond fide*, and only to obtain information with a view to paying off the mortgage ?

*A.*—It is said that a mortgagee cannot be compelled to produce his mortgage deed or any of the deeds until he has been paid off : though the application be made *bond fide* only to obtain information with a view to paying off the mortgage : (Sm. Man. sect. 526.) But it was held by Stuart, V.C., that the mortgagee is bound to produce the mortgage deed itself, though not the title deeds, for that deed is as much evidence of the mortgagor's title to redeem, if it contain such a proviso, as it is of the mortgagee's estate : (*Patch v. Ward*, L. Rep. 1 Eq. 436 ; but see *Chichester v. M. of Donegal*, L. Rep. 5 Ch. App. 497.) As to mortgages made after 31st December, 1881, the mortgagee must now at the mortgagor's costs allow him to inspect and make copies of the documents of title : (44 & 45 Vict. c. 41, s. 16.)

*Q.*—Is a mortgagee of a mortgage executed before or after the passing of the Conveyancing Act, 1881, bound to produce his mortgage deed or any of the title deeds in his possession to the mortgagor or any person claiming under him, and can he be compelled to re-convey on payment into court of the money due to him ?

*A.*—As to production, see above. Under sect. 5 of the Act, on a sale of the property after the Act, the court may allow payment into court of an amount sufficient to meet the incumbrance and costs, and may then make an order for conveyance or vesting order proper for giving effect to the sale.

*Q.*—When a second mortgagee issues a writ for foreclosure, how is the first mortgagee to be dealt with ?

*A.*—A reference to take an account of principal and interest, and to tax costs due to the first mortgagee, is directed by the judgment, and six months after the date of the chief clerk's certificate is given to the plaintiff to redeem the first mortgage ; and in default of his so doing the writ is dismissed : (Seton on Decrees, 217, 220, 2nd edit.) But the second mortgagee may foreclose without making the first a party, subject, however, to the latter's legal title and rights : (Sm. Pr. 353, 7th edit.)

*Q.*—How can a mortgagor be exonerated from a covenant to pay the mortgage money otherwise than by payment or release ?



A.—If a mortgagee so deals with the mortgaged estate as to render it impossible for him to restore it on full payment, he cannot sue to recover the mortgage money, as where he joins in an alienation of the property and receives no part of the purchase money: (Sm. Man. sect. 549.) And if a mortgagor makes no payment and gives no acknowledgment in writing for *twelve* years he cannot now be sued on the covenant: (see 37 & 38 Vict. c. 57, s. 8.)

Q.—What is the nature and object of a writ of redemption?

A.—It is a writ issued by a mortgagor to get back his estate on payment of principal, interest, and costs: (see St. Eq. § 1013; and see *Casborne v. Scarfe*, 2 L. O. Eq. 862, 2nd edit.)

Q.—What classes of persons are considered to possess such an interest in an equity of redemption as to entitle them in equity to redeem a mortgage?

A.—All persons who have a legal or equitable interest in or lien upon the property are entitled in equity to redeem a mortgage. For example, a tenant for life by the curtesy, jointress, tenant in dower in some cases, judgment creditor, remainderman, &c.: (Sm. Man. sect. 555.)

Q.—Where a mortgagee is in possession, what is the time limited within which a mortgagor may bring an action to redeem?

A.—Formerly twenty years; now within twelve years next after the time at which the mortgagee obtained such possession of the mortgaged property, unless in the meantime an acknowledgment of the title or right of redemption of the mortgagor has been given to the mortgagor, &c., in writing, signed by the mortgagee, or the person claiming through him: (see 3 & 4 Will. 4, c. 27, s. 28; Sug. R. P. Stats. 109, 110; 37 & 38 Vict. c. 57, s. 7.)

Q.—Where money secured by mortgage is also secured by bond as collateral security, within what time must an action on the bond be brought?

A.—Within twelve years (37 & 38 Vict. c. 57, sect. 8; *Sutton v. Sutton*, 22 Ch. D. 511.)

Q.—Distinguish between the responsibility of a trustee for sale and a mortgagee exercising a power of sale.

A.—A trustee is bound to observe the utmost diligence (*exacta diligentia*) and must take care to sell at the best time, &c., to protect him from liability; while a mortgagee is not considered, strictly speaking, as a trustee, and if he exercises the power (which is given him for his own benefit) *bond fide*, in order to realise the mortgage debt without corruption or collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous, unless, indeed, the price is so low as in itself to be evidence of fraud: (*Warner v. Jacob*, 51 L. J. Ch. 645.)

Q.—What are the rights and duties of a mortgagee in possession in respect of the mortgaged estate?

A.—The rights of a mortgagee in possession are to take the rents and profits of the land unless there is some agreement to the contrary, and if

the security is insufficient he may fell timber and sell it towards liquidation of his debt, or in any case when ripe for cutting; and may open mines: but with these exceptions he must not commit waste. By sect. 18 of 44 & 45 Vict. c. 41. he may make leases as therein regulated. He may also obtain a settlement under the poor laws, and may vote at elections.

His duties are to keep strict accounts of what he receives and pays, and he is liable to the mortgagor for rents and profits which he has received, or which, but for his wilful default, he might have made; and if he assigns over his mortgage without the consent of the mortgagor, he is still bound to answer for the profits to the mortgagor, both before and after the assignment, though assigned only for his own debt. He must also keep the premises in proper repair: (see Sm. Man. sect. 559, &c.; Coote Mort. 303, 3rd edit.)

Q.—What are the rights and duties of a mortgagee in possession with reference to repairs of the property?

A.—A mortgagee in possession is not obliged to lay out money further than to keep the property in necessary repair, and he has no right to make it more expensive for the mortgagor to redeem than may be required for the purpose of keeping the property in a proper state of repair and of protecting the title to the property. Hence he will not be allowed for general improvements made without the consent or acquiescence of the mortgagor: (Sm. Man. sect. 561.)

Q.—What accounts will be directed in an action by a mortgagor against a mortgagee in possession?

A.—An account of the rents and profits the mortgagee has received, and of the sums paid by him, and of what, but for his wilful default or neglect, he might have received; an occupation rent being charged for land occupied by him; an account is also taken of the amounts due to the mortgagee for principal, interest, and costs: (Sm. Man. sect. 515.)

Q.—A. advances money by way of equitable mortgage on the deposit of a lease, and, on default of the mortgagor, enters into possession. What is his position as regards the lessor in respect of rent and covenants under the lease, and can he be compelled to take a legal assignment?

A.—He will not be bound personally, but the lessor will be able to distrain or re-enter for the breach, and the mortgagee cannot be compelled to take a legal assignment: (1 Prideaux, 461, and see *Ex parte Walton*, 50 L. J. 661, Ch.)

Q.—A. grants a lease of Greenacre to C., and mortgages Greenacre to B.; C. the tenant fails to pay his rent. Who can sue C. for the rent, and who can bring an action of ejectment?

A.—If B. (the mortgagee) has given no notice of his intention to take possession or to enter into receipt of the rents and profits, A. (the mortgagor) may now sue for the rents and profits or to recover possession of the property: (1873 Act, s. 25, sub-s. 5.) Otherwise B. might sue.

Q.—What is meant by taking accounts between mortgagor and mortgagee in possession, with annual rests; and in what case is the mortgagee relieved from having them so taken?

A.—It means that a balance of the rents and interest is struck at the end of each year, and the surplus rents applied in reduction of the mortgage debt. A mortgagee is relieved from having the accounts so taken if the interest was in arrear when he entered into possession : (*Nelson v. Booth*, 3 D. & J. 119.)

Q.—Can a mortgagee make his mortgagor account for rents or profits received by him (the mortgagor) while in possession, and whether the estate is a sufficient security or not ?

A.—So long as the mortgagor continues in possession by the permission of the mortgagee, he is entitled to take the rents and profits in his own right without rendering any account whatever to the mortgagee, though the property be an insufficient security : (Sm. Man. sect. 559.)

Q.—How may the disadvantages of being a mortgagee in possession in practice be obviated ?

A.—By appointing a receiver where there is a proper provision for this purpose in the mortgage deed ; or, if not, by the mortgagee availing himself of the power for that purpose given by 23 & 24 Vict. c. 145, where that Act applies ; or by 44 & 45 Vict. c. 41, s. 19, where the mortgage is executed after 31st December, 1881.

Q.—How and when may a mortgagee appoint a receiver under the powers of the Conveyancing and Law of Property Act, 1881 ?

A.—Where the mortgage is made by deed the mortgagee may, when the mortgage money has become due, and as soon as he is entitled to exercise the power of sale, appoint a receiver of the income of the mortgaged property or any part thereof by writing under his hand : (44 & 45 Vict. c. 41, ss. 19, 24.)

Q.—A. mortgages to B. without delivery of the title deeds, and executes a subsequent mortgage of the same property to C. (who has the title deeds) without notice of the first mortgage. Will B. be postponed to C. ?

A.—If B., the first mortgagee, voluntarily and unjustifiably, through fraud or gross negligence, allowed the mortgagor to retain the title deeds, he will be postponed to C., but the onus of proving such fraud or negligence is on C. : (see *Finch v. Shaw*, 19 Beav. 500 ; Sm. Man. sect. 535.)

Q.—If distinct estates be mortgaged by separate deeds to the same person, is the mortgagor entitled to redeem one estate without the other ? And can he do so if the estates were originally mortgaged to separate mortgagees, and were afterwards transferred to one person ?

A.—The mortgagor cannot do so in either case : (Sm. Man. sect. 554 ; *Vint v. Padgett*, 32 L. T. Rep. N. S. 66), but in case of a mortgage executed after 31st December, 1881, he can do so : (44 & 45 Vict. c. 41, s. 17.)

Q.—A. by separate deeds mortgages Whiteacre and Blackacre to B., and afterwards sells the equity of redemption of Whiteacre to C. Discuss B.'s position with reference to A. and C. respectively. On what terms can C. redeem Whiteacre ?

A.—B. can still sue A. for both mortgage debts, and take proceedings to foreclose Blackacre against him, which the latter cannot redeem without redeeming Whiteacre. With respect to C. the latter also will not be able

to redeem the equity of redemption in Whiteacre without redeeming Blackacre : (see *Vint v. Padgett*, 32 L. T. Rep. N. S. 66); but see last answer if the mortgage is executed after 31st December, 1881.

*Q.*—A. is first mortgagee of Whiteacre and Blackacre, B. is second mortgagee of Blackacre ; what are B.'s rights against A ? If A. exhausts Blackacre in payment of his mortgage, can B. obtain satisfaction out of Whiteacre ? If so, how ?

*A.*—B. is entitled to have the securities marshalled, and to throw A.'s mortgage primarily on Whiteacre, by which means he may himself obtain payment from Whiteacre not exceeding the amount realised by Blackacre : (see Dart's V. & P. 915, 5th edit.)

*Q.*—A., B., and C. have successive mortgages on Blackacre, A. having the legal estate. Subsequently C. takes a transfer of A.'s security, including the legal estate. B. then seeks to redeem the first mortgage alone. In what cases, and on what terms, will equity aid him in doing so ?

*A.*—If C. advanced his money with notice of B.'s mortgage, equity will, notwithstanding the transfer, allow B. to redeem the first mortgage without redeeming the third also. Had C., however, had no notice of B.'s mortgage when he advanced his money, then he would have been able to tack his third mortgage to the first, and B. could not have redeemed the first without redeeming the third also : (*Marsh v. Lee*, 1 L. C. Eq. 494, 2nd edit. ; *Watts v. Symes*, 1 De G. M. & G. 240 ; Sm. Man. sect. 529, &c. ; 37 & 38 Vict. c. 78, s. 7, is repealed by 38 & 39 Vict. c. 87, s. 129, and this latter section is repealed by 46 & 47 Vict. c. 39.)

*Q.*—By a legal mortgage in the ordinary form, a mortgage of freeholds is made to A. B. The name A. B. was inserted by mistake for X. Y. It is proposed to tear up the mortgage, and make a fresh one to the proper mortgagee. Is this the right course ; if not, what is, and why will not the tearing up be effectual ?

*A.*—This would not be the right course ; the proper mode would be to have a transfer of the mortgage by A. B. to X. Y., as, the legal estate having been conveyed to A. B. by the mortgage, it must remain in him till reconveyed by a regular deed. Tearing up the deed would have the effect of cancelling the debt, but not of divesting A. B. of the legal estate : (see *ante*, p. 329.)

*Q.*—A mortgagee has called in the mortgage-money, which the mortgagor is unable to pay, but a third party is willing to advance it upon a transfer of the mortgage. Is the mortgagee bound to transfer the mortgage, and what course must be pursued if he refuses ?

*A.*—Formerly a mortgagee could not be compelled to assign the mortgage-debt on redemption, though he was bound to convey the estate : (*Coote Mort.* 347, 3rd edit.) As the proviso for redemption and reconveyance are now drawn, no difficulty arises in this respect ; and since 31st December, 1881, if the mortgagee is not in possession, he is bound to transfer by 44 & 45 Vict. c. 41, s. 15.

*Q.*—A mortgagee who has foreclosed alleges that the estate is not of sufficient value to satisfy the mortgage debt. What advice should you give him as to further proceedings ?

A.—Before selling any part of the estate he should sue on the covenant for the alleged deficiency : (*Lockhart v. Hardy*, 9 Beav. 349.)

Q.—A mortgagee after foreclosure sold the mortgaged estate, but it did not produce enough to pay the principal, interest, and costs due, and he sued for the residue upon the mortgage bond ; will equity interfere to stop him ? What would have been the case if the mortgagee had not sold the estate after foreclosure, but had sued for an alleged deficiency on the bond : would the foreclosure be opened or not in equity ?

A.—In the first case put, the mortgagee cannot, after selling the foreclosed estate, sue on the bond for any deficiency that may arise. If he do not sell the estate after the foreclosure, but sues on his bond or covenant, this will have the effect of opening the foreclosure, and giving to the mortgagor the right to redeem again : (see Sm. Man. sect. 548 ; *Lockhart v. Hardy*, 9 Beav. 349, *et ante*.)

Q.—State the general purposes for which a mortgagee in possession may expend money upon the mortgaged estate which will be allowed to him by equity in taking the account between the mortgagor and mortgagee ?

A.—He will be allowed sums paid for arrears of rent, or for maintaining the title to the estate, or for necessary repairs, or the expenses of renewing a renewable leasehold, with interest from the time the sums were advanced. But he cannot entitle himself to any charge for management. Nor will he be allowed for general improvements made without the consent of the mortgagor, for he has no right to make it more expensive for the mortgagor to redeem than is necessary : (Sm. Man. sect. 514, 522, &c. : Coote, Mort. 536, 3rd edit.)

Q.—A. lends money to B. on a deposit of title-deeds and an agreement to execute a mortgage with power of sale ; B. fails to pay the money or to execute the mortgage, and A. wishes to sell the property ; can he sell under the power before the mortgage has been executed ?

A.—A. cannot, before the mortgage is executed, proceed to sell the property, but he may in equity compel B. to execute a legal mortgage with a power of sale : (see *Matthews v. Goodday*, 5 L. T. Rep. N. S. 572 ; *The London, &c., Co. v. Brown*, 12 *ib.* 199.)

Q.—If two persons advance a sum of money by way of mortgage, and take a mortgage to themselves as joint tenants, and one of them dies, what are the rights of the survivor as to the mortgage debt and the securities ?

A.—The survivor will in equity be a trustee for the representatives of the deceased to the amount he advanced. The security itself vests in the survivor, but, unless there was the usual declaration that the money was advanced on a joint account, &c., it seems the survivor cannot give a receipt for the mortgage money (*Matson v. Woodthorpe*, 10 L. T. Rep. N. S. 391 ; *Lake v. Craddock*, 1 L. C. Eq. 151, 2nd edit.) ; but if the mortgage is executed after the 31st Dec. 1881, the survivor can give a proper discharge by 44 & 45 Vict. c. 41, s. 61.

Q.—In the power of sale in a mortgage-deed of real estate, it is

declared that the mortgagee shall hold the surplus of the moneys arising from the sale in trust for the mortgagor, his "executors, administrators or assigns." After the sale under such power, is the surplus to be considered real or personal estate, and does it make any difference whether such sale takes place in the lifetime of the mortgagor, or after his death?

A.—The surplus would, if the mortgagor were living, be personal estate; but, if the sale took place after the mortgagor's death, then, as a mortgage is only considered in equity as a security for money, the estate would descend to the heir of the mortgagor, and the surplus after the estate was sold would still be real estate, and if paid to the executors, &c., of the mortgagor, they would be trustees for the mortgagor's heir-at-law: (see Sm. Man. sect. 544.)

Q.—In administering an estate where the deceased was possessed of land subject to a mortgage, secured also by bond of the deceased; as between his real and personal estate, which is to pay the debt?

A.—By the 17 & 18 Vict. c. 113, it is expressly enacted that the heir-at-law or devisee shall take the land subject to the mortgage if no contrary intention be expressed in the will: (see fully, *ante*, p. 267). The fact of the mortgage debt being also collaterally secured by the bond of the deceased will not affect the provisions of this Act: (*Coleby v. Coleby*, L. Rep. 2 Eq. 803.)

Q.—Can title deeds in the hands of an equitable mortgagee by deposit be made a security (subject to the lien of the depositary) to another person making a subsequent advance of money to the owner of the estate?

A.—Yes; this may be effected (subject to the first mortgage) by a memorandum showing the debtor's intention to make his lands a charge for the advance (see *Daw v. Terrell*, 33 Beav. 218; and see Sm. Man. sect. 542); or, if thought fit, by a regular legal mortgage (St. Eq. §§ 390, 393, 1010).

## APPORTIONMENT AND CONTRIBUTION, &c.

Question.—On what principle is the right and duty of contribution between sureties founded?

Answer.—It is founded on principles of natural justice; not on mutual contract, express or implied: (Sm. Man. sect. 633; *Dering v. Earl of Winchelsea*, 1 L. O. Eq. 89, 3rd edit.)

Q.—A tenant for life pays off incumbrances on the fee, and does not take a transfer of the security. What are the rights of his representatives with reference to the amount paid off?

A.—His representatives will stand in the place of the incumbrancers notwithstanding the absence of an assignment. Otherwise it would be making him discharge the debts of another: (St. Eq. § 486; Sm. Man. sect. 626.)

Q.—What securities is a surety (paying the debt) entitled to have the benefit of, and what alteration in the law was made by the Mercantile Law Amendment Act, 1856?



A.—Until the 19 & 20 Vict. c. 97, the surety was only entitled to collateral securities held by the creditor, and not to the principal security, as that was said to be satisfied by the payment. By this Act, however, the surety so paying is entitled to every judgment, specialty, or other security held by the creditor in respect of such debt, whether it be or be not deemed at law to have been satisfied by payment of the debt, and the surety is entitled to stand in the place of the creditor: (sect. 5; Sm. Man. sect. 655.)

Q.—State how the remedy for contribution between sureties was more beneficial in equity than at law.

A.—At law on the death of one surety his representatives were discharged from liability, and the loss fell on the survivor, but in equity the representatives of the deceased one remained liable. So at law, if one of three sureties became bankrupt and another paid the whole amount, he could only recover a third part from the solvent surety: but in equity the solvent surety would contribute a moiety: (see *Dering v. Earl of Winchelsea*, Tud. L. C. Eq. 89, *in notis*, 3rd edit.)

Q.—If A., B., and C. become sureties for D., and A. is compelled to satisfy the whole liability, what remedy, if any, has he against B. and C. respectively, and will B.'s liability be greater if C. had become insolvent?

A.—A. may compel B. and C. to contribute each one-third of the amount he has been compelled to pay; in case of C.'s bankruptcy he can recover one half from B: (Sm. Man. sect. 635.)

Q.—A. and B. are jointly and severally liable to C. as sureties for D., and A. being sued alone pays the whole amount for which they are sureties. Has he any, and what, remedy against B.? How would it be if A. and B. were severally liable under different instruments, neither of them knowing that there was a second surety?

A.—A. could always obtain contribution against B. in the first instance, and by the 19 & 20 Vict. c. 97, the surety is entitled to every security held by the creditor in respect of such debt; and he would be enabled to sue B. for his share under the separate instrument, of which he was at first ignorant.

Q.—Under what circumstances will a surety be discharged in equity from his liability?

A.—If the creditor does any act or omits to do any act or duty which he is required to do by the surety, or is bound to do, and that act or omission may prove injurious to the surety, or if the creditor enters into a binding stipulation with the debtor unknown to the surety and inconsistent with the terms of the original contract, the surety may set up such contract as a defence to any action brought against him: (Sm. Man. sect. 164.)

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## PARTNERSHIP.

*Question.*—What remedy has one partner against another in case of any breach of the articles of the partnership, and what proceedings are necessary to secure the assets of the partnership?

*Answer.*—If the articles of partnership are broken, an action may be brought to recover damages. But a more efficient remedy is to issue a writ in the Chancery Division of the High Court for an account and injunction, and apply that a manager and receiver be appointed to close the business and sell the property: (see St. Eq. §§ 661, 662, 663, 672.) (a)

*Q.*—In what way and under what circumstances can partners compel an account *inter se*?

*A.*—If a dissolution of the partnership has taken place or is asked for, or the partnership has expired, equity will decree an account *inter se*, on a writ being issued: (b) (St. Eq. §§ 671, 672; Sm. Man. sect. 643.)

*Q.*—In what cases will equity decree a dissolution of the partnership before the regular time, and how is its aid sought?

*A.*—If it is impracticable to carry on the undertaking at all, or at least according to the stipulations of the articles, or in case of the insanity, permanent incapacity, or gross misconduct of one of the parties, equity will, on a writ being issued, decree a dissolution of the partnership before the regular time: (St. Eq. § 673; Sm. Man. sect. 640.)

*Q.*—A. commences business in partnership with B. without written articles or stipulation as to duration of the partnership, and after a time discovers that B. is collecting debts due to the firm without entering the sums received in the partnership books or paying them into the partnership bank. State the steps which, upon being consulted by A., you would take for its protection?

*A.*—Give notice to dissolve the partnership at once if this is not contrary to the partnership agreement; if it is, issue a writ in the Chancery Division for a dissolution, and for the appointment of a receiver and manager.

*Q.*—How is a partnership dissolved in ordinary cases?

*A.*—By death; by the act of parties; by the bankruptcy of one, or both, or all; or by effluxion of time; it may also be dissolved by judgment of the court, or by marriage of a female partner: (Sm. Man. sect. 640; Chit. Cont. 242, 11th edit.)

*Q.*—In the case of a partnership existing at the will of the parties, will equity in any circumstances interfere to prevent a dissolution?

*A.*—Yes; equity will grant an injunction against a sudden dissolution if it is about to be made in ill-faith, and would work irreparable injury: (St. Eq. § 668; Sm. Man. sect. 641.)

*Q.*—If a partner becomes a lunatic, does the lunacy occasion a dissolution of the partnership?

*A.*—The lunacy does not operate as a dissolution of the partnership; but if a partner is incapacitated by permanent lunacy from performing his duties in the partnership business, equity will decree a dissolution: (see *Rowlands v. Evans*, 5 L. T. Rep. N. S. 658.) The dissolution has reference

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(a) By the 1873 Act, s. 34, sub-s. 3, the exclusive jurisdiction of equity in the dissolution of partnership or the taking of partnership or other accounts is retained by the Chancery Division.

(b) The old decree in equity is now called a judgment.

to the date of the judgment, and not to the time of the lunacy : (Adams' Eq. 243.)

**Q.**—How is the partnership estate and the separate estate of each partner applied in winding-up an insolvent partnership ?

**A.**—The creditors of the partnership have a right to payment of their debts out of the partnership funds before the private creditors of either of the partners, although at law this was generally disregarded. On the other hand the separate creditors of each partner are entitled to be first paid out of the separate effects before the partnership creditors can claim anything, although at law a joint creditor might proceed directly against the separate estate : (Sm. Man. sect. 649.)

**Q.**—Two men enter into a partnership without any express agreement ; what is the duration of the partnership, and is there any legal or equitable presumption as to the share each was intended to have ?

**A.**—The partnership is one at will. The presumption would be that each should share equally in the profits in absence of evidence to the contrary.

**Q.**—What interest in the partnership passes to the personal representatives of a deceased partner ?

**A.**—In absence of condition to the contrary the share of the deceased in the partnership assets, after payment of the liabilities, will vest in his personal representatives. The partnership is dissolved so far as his estate is concerned : (see Lindley on Partnership, p. 681.)

**Q.**—A., a partner in a trading firm, dies, constituting the other partners his executors. They carry on the business without withdrawing A.'s assets. No settlement of accounts having been come to, an action is commenced by a beneficiary under A.'s will. Up to what time is A.'s estate entitled to share in the profits of the business ? Give your reasons.

**A.**—A.'s estate is entitled to share in the profits so long as his assets remain in the business, because such assets are liable for the debts, and form part of the fund from which the profits arise : (*Vyse v. Foster*, L. Rep. 7 H. of L. 329.)

**Q.**—On a dissolution of partnership by effluxion of time, what in the absence of agreements are the rights of late partners as to (a) Partnership premises ; (b) The goodwill and trade marks (if any) ; and (c) The collection of outstanding partnership assets ; and how may they be enforced ?

**A.**—(a) The partnership premises are part of the partnership assets, and any partner can insist on their being sold, which right he can enforce if necessary by writ in the Chancery Division in the High Court.

(b) The goodwill and trade marks are likewise parts of the assets, and must be sold if any partner desire it, but each partner will be entitled to carry on the business in his own name in the neighbourhood : (Lindley on Part. 882, 886, 3rd edit.)

(c) Any partner can give a valid receipt for any of the debts outstanding. It is usual to appoint one of the partners to get in the debts or to agree upon a third person ; but if disagreements ensue and litigation

arise, a receiver will be appointed to get in the partnership assets : (see *Ib.* 890.)

*Q.*—Upon the death of one of two partners, what will be the respective legal positions of the surviving partner and of the representatives of the deceased partner, with regard to the goodwill of the partnership business, in default of any provision in the partnership articles to meet the case ?

*A.*—In the event of dissolution by death it has been said that the goodwill survives and there is a clear decision to this effect (*Hammond v. Douglas*, 5 Ves. 539.) But modern authorities are wholly opposed to the notion that the value of the goodwill, as such, belongs to the survivor. It undoubtedly may happen that the survivor may obtain the benefit of the goodwill without paying for it ; for he is at liberty (unless restrained by agreement) to carry on business on his own account and possibly in the name of the late firm, but he cannot sell the goodwill for his own benefit : (see *Smith v. Everett*, 27 Beav. 446.)

On the other hand, if the goodwill is put up for sale by the representatives of the deceased it will produce nothing if it is known that the surviving partner will exercise his rights : (Lindley on Partnership, 4th edit. 861.)

*Q.*—How far is notice to one of several partners and to a director of a joint-stock company binding on the firm and the company respectively ?

*A.*—Notice of any matter relating to the partnership, if given to one partner, is constructive notice to them all (*Hallilay's Conc. Conv.* 119), but notice to a director will not bind the company unless afterwards adopted, the proper mode of service being to leave or send them to the registered office of the company : (25 & 26 Vict. c. 89, s. 62.)

*Q.*—The vendor of a goodwill of a business receives by way of consideration a share of the future profits ; how is he affected by the subsequent bankruptcy of the purchaser ?

*A.*—He is not to be deemed a partner with the purchaser, but he cannot recover any portion of the profits until all other creditors for value are satisfied : (28 & 29 Vict. c. 86, ss. 4, 5.)

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## MARSHALLING SECURITIES.

*Question.*—What is meant by the marshalling of securities ?

*Answer.*—Marshalling of securities bears a close analogy to the marshalling of assets, which has already been considered. The general doctrine is, that if a creditor has a lien on, or interest in, two funds belonging to one person, and another creditor has a lien on, or interest in, one only of the funds, and the claims of both could not be satisfied if the former were to resort to that fund to which alone the latter is entitled, then the latter creditor has a right in equity to compel the former to resort to the other fund in the first instance for satisfaction, whenever it will not operate to the prejudice of the party entitled to the double fund, or to the common debtor : (Sm. Man. sect. 652.)

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## DAMAGES AND COMPENSATION.

*Question.*—What was the difference between courts of equity and common law in their respective modes of considering the performance of covenants?

*Answer.*—At law (and as a general rule in equity also) if a man undertook to do an act by way of covenant, and it was practicable to be done, he was bound to perform it punctiliously, or suffer the consequences. And in general there was no relief originally in such cases at law, only in equity; but latterly relief might be had in certain cases at law by the operation of various statutes. Courts of equity, however, did not hold themselves bound by such rigid rules as courts of law: (see St. Eq. §§ 1301-1303, 1311 *et seq.*; Sm. Man. sect. 668, &c.)

*Q.*—What is the general rule of equity in granting relief against penalties and forfeitures for breaches of covenant?

*A.*—Where a penalty or forfeiture appears to have been inserted to secure the performance of some act, &c., equity regards the performance of such act, &c., as the substantial object of the party interested therein: and if a compensation can be made for the non-performance thereof, it will relieve again the penalty or forfeiture, by decreeing a compensation in lieu of the same, proportionate to the damage sustained: (*Peachey v. Somerset*, 2 L. C. Eq. 895, 2nd edit.; Sm. Man. sect. 671.)

*Q.*—When will the court relieve against an act of forfeiture of copyholds committed by a copyholder?

*A.*—Where a forfeiture was incurred by a copyholder making leases, felling timber, digging stones, and grubbing up hedges contrary to the custom of the manor the court refused to relieve (*Peachey v. Duke of Somerset*, 2 White & Tudor, L. C. 1100), and it was expressed that the true ground of relief against penalties was from the original intent of the case; if the penalty was designed only to secure money, then, on recompense being given, the court would grant relief.

## ELECTION, ADEMPMENT, AND SATISFACTION.

*Question.*—What is the doctrine of election?

*Answer.*—Election is the choosing between two rights by a person who derives one of them under an instrument in which a clear intention appears that he should not enjoy both: (Sm. Man. sect. 679.)

*Q.*—Explain by instances the meaning of the term—election.

*A.*—A testator, seised of Blackacre in fee and Whiteacre in tail, devises Blackacre to his eldest son and Whiteacre to the younger, and dies. The eldest son claims Blackacre as devisee, and Whiteacre (which his father had no legal power to devise) as heir in tail. This would not be allowed, the court saying, You must either claim under or against your father's will—if you take Blackacre as devisee, you must give up Whiteacre to which you are entitled as tenant in tail to compensate your younger brother, or *vice versa*: (Haynes, 309, 3rd edit.)

*Q.*—State the principle upon which the equitable doctrine of election

is founded. A. devises Whiteacre to B. and purports to devise to C. Blackacre, which really belongs to B.; upon what terms can B. claim Whiteacre? If he elects to retain Blackacre, what is C.'s position? And can B. make any claim against Whiteacre? If any, what? Is forfeiture or compensation the principle applicable to the case?

A.—The doctrine is founded upon the intention, explicit or presumed, of the author of the instrument to which it is applied: (*Dillon v. Parker*, 1 Swans. 401.)

B. can only take Whiteacre on compensating C. for the loss of Blackacre. If he elects to retain Blackacre, equity holds him as a trustee of Whiteacre for the benefit of C. to the extent of the value of Blackacre. Compensation, not forfeiture, is the rule: (see Haynes, 321, 3rd edit.)

Q.—Could a plaintiff suitor in England carry on proceedings for the same objects in both the common law and equity courts, with any and what exception; and could the doctrine of election be forced upon him by a defendant; and what does the word election mean?

A.—As stated, *ante*, p. 481, a mortgagee could pursue all his remedies at once; with this exception, as double vexation was not allowed, the plaintiff would have been compelled to elect in which court he would proceed. For the meaning of the word election, see preceding answers.

Q.—An estate is absolutely limited by settlement to a married woman in the event of her surviving her husband; the husband, misconceiving his rights, devises the estate to a third party by will; and, by the same will, bequeaths a legacy to his wife. On his death, can the wife claim both her estate and the legacy; or what are the respective estates of the wife and devisee?

A.—The wife cannot claim both her estate and the legacy, but will be put to her election: if she elects to keep her estate, the legacy given her by the will will be applied in compensating the disappointed devisee: (see Sm. Man. sect. 681; *Noys v. Mordaunt*, 1 L. C. Eq. 271, 2nd edit.; *Streatfield v. Streatfield*, *ib.* 273.)

Q.—If A., by his will, bequeaths B.'s property to C., and gives a legacy to B., can B. insist on being paid the legacy, and retain the property bequeathed by A.?

A.—No; he will be put to his election: (see St. Eq. § 1075 *et seq.*; Sm. Man., *ubi sup.*)

Q.—If a legacy is given on condition that the legatee shall not dispute the will, what will equity decree?

A.—That he will be put to his election: he cannot claim the legacy and dispute the will: (1 Hughes' Pract. Sales, 378, 380, 2nd edit.; *Wright v. Wilkin*, 33 L. T. Rep. N. S. 277.)

Q.—If land be held on trust for sale and conversion into money, and distribution of the proceeds among A., B., and C., can they, or any one or more of them, elect to take the land or their shares of it as realty?

A.—A., B., and C. may jointly elect to take the land or their shares as realty, but one of them cannot elect without the others: (*Holloway v. Radcliffe*, 23 Beav. 163.) But if money be directed to be laid out in land, to the use of several persons as tenants in common, one of them may



elect to take his share of the money: (see *Fletcher v. Ashburner*, 1 L. C. Eq. 778, 3rd edit.)

**Q.**—What is an ademption of a legacy? Give some instances of ademption.

**A.**—The ademption of a legacy is an implied revocation or satisfaction of it by dealing with the legacy, and not by altering the will. Thus, if the testator bequeath a *specific* legacy (*ex. gr.*, a particular horse or ring) to a legatee, and afterwards part with the article bequeathed, the legacy is adeemed. But this rule does not apply to general legacies given to strangers, nor even to demonstrative legacies: (Wms. Exors. 825, &c., 3rd edit.; *Ashburner v. Macquire*, 2 L. C. Eq. 229, 2nd edit.)

**Q.**—Explain the doctrine of “satisfaction” of portions and debts by legacies.

**A.**—Satisfaction is the making of a donation with the express or implied intention that it shall be taken as an extinguishment of some claim which the donee has upon the donor. As if a portion is secured by marriage settlement or otherwise to a child, and the parent or person standing *in loco parentis* afterwards bequeaths the same child a legacy which is substantially the same in nature, amount, time of payment, &c., and be not given for a different purpose, it will (by implication) be a satisfaction of the portion, either altogether or *pro tanto*, according to circumstances: (Sm. Man. sect. 704.) As to satisfaction of debts, see *infra*.

**Q.**—A father bequeaths to a child a legacy of 1000*l.*, and afterwards, in his lifetime, gives to the same child a portion of 1000*l.*; on the father's death can the child claim the legacy, and would it be the same if the legacy was a gift of the residue only?

**A.**—In the absence of evidence to the contrary, the portion will be deemed a satisfaction or ademption of the legacy: (*Ex parte Pye*, 2 L. C. Eq. 303, 2nd edit.) But this rule (see St. Eq. §§ 1111, 1112) did not formerly apply to gifts of the residue, which are always changing in amount. It has, however, lately been held that a portion to a child may be a satisfaction of a residuary legacy, either wholly or partially, especially if that appears to have been the testator's intention: (*Montefiore v. Guadalla*, 1 L. T. Rep. N. S. 251.) (a)

**Q.**—Is the satisfaction of a legacy applicable to strangers as well as to children?

**A.**—Not of a general legacy unless under some peculiar circumstances; as where the legacy is bequeathed for a particular purpose, and a portion is afterwards given by the testator by an act *inter vivos*, exactly for the same purpose and for none other: (St. Eq. §§ 1117, 1118; Sm. Man. sect. 710; *Ex parte Pye*, *sup.*)

**Q.**—In what case is a legacy in money to a creditor of the testator considered in equity to be an extinguishment of the debt?

**A.**—When it is of equal amount to the debt, and in other respects equally beneficial, and there is an absence of countervailing circumstances:

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(a) The following question is answered by this and preceding answers: Explain the doctrine of “ademption” with reference to specific legacies and to legacies given as portions. Illustrate your answer by examples.

on the principle that a testator shall be just before he is generous; and the debt must have been due at the date of the will. If, however, there is an express provision in the will for payment of debts, this rule does not prevail; nor generally where the gift is of a residue, nor where the debt is a negotiable security: (Sm. Man. sect. 712; *Talbot v. Earl of Shrewsbury*; *Chancey's case*, 2 L. C. Eq. 346, 3rd edit.)

Q.—A pecuniary legatee on being paid his legacy is told that he would have lost it but for a direction in the will that the testator's debts should be paid. Explain fully how this might happen.

A.—It would happen if the pecuniary legatee was also a creditor of the testator, as the direction to pay debts is evidence of an intention on the part of the testator to exclude the doctrine of the satisfaction of his debt by the legacy: (see Haynes' Out., note a, p. 372, 4th edit.)

Q.—What are the rules as to the admission of extrinsic evidence, (1) to raise the presumption that a portion covenanted to be given by a settlement is satisfied by a subsequent legacy, (2) to rebut such presumption?

A.—The law presumes that a portion covenanted to be given by a settlement is satisfied by a subsequent legacy of the same description where the settlor and testator is a parent (or *in loco parentis*), and extrinsic evidence may be required, and is admissible, to show this. But this being proved, the presumption is raised by extrinsic evidence from the nature of the two presumptions. Extrinsic evidence is always admissible to rebut the presumption, and such evidence may be met by extrinsic evidence to support the presumption: (*Lord Chichester v. Coventry*, L. Rep. 2 H. & H. p. 71, and cases there cited, and see Haynes' Out. Ch., "Satisfaction.")

Q.—Supposing the presumption mentioned in the foregoing question to have been established, what is the position of the parties claiming the portion under the settlement?

A.—They may insist upon retaining the portion under the settlement, or in lieu thereof may take the legacy, but they cannot take both. It is, in fact, a case of election: (see Haynes' Out., Lect. XI.)

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## PARTITION.

Question.—What relief does equity give where a joint tenant, or tenant in common, is desirous of having the joint property divided?

Answer.—The mode in which relief is administered in such cases is by first ascertaining the rights of the several parties interested, and then issuing a commission to take the partition; (a) and on the return of the commission, and confirmation of the return by the court, the partition is finally completed by mutual conveyances of the lots made to the several parties: (Sm. Man. sect. 715: *Agar v. Fairfax*, 2 L. C. Eq. 374, 2nd edit., and see *infra*.)

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(a) But it has lately been held by the court that a commission is seldom necessary to effectuate the partition, and should not be ordered: (*Clarke v. Clayton*, 3 L. T. Rep. N. S. 176.)

**Q.**—Has the Chancery Division exclusive jurisdiction in cases of partition? Does the jurisdiction extend to copyholds?

**A.**—The Chancery Division has exclusive jurisdiction in cases of partition (1873 Act, s. 34, sub-s. 3); the common law remedy by writ of partition was abolished by the 3 & 4 Will. 4, c. 27, s. 36. The jurisdiction of the court was extended to copyholds by the 4 & 5 Vict. c. 35, s. 85.)

**Q.**—Have County Courts any, and if any, what jurisdiction in cases of partition?

**A.**—By 31 & 32 Vict. c. 40, s. 12, jurisdiction in all actions of partition or for sales in lieu of partition, is conferred on County Courts in all cases where the value of the property does not exceed 500*l*.

**Q.**—In an action for partition can the court under any, and if so what, circumstances order a sale?

**A.**—Where judgment for partition may be made, and it appears to the court that by reason of the nature of the property, or of the number of the parties interested, or of the absence or disability of some of those parties, or of any other circumstances, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a partition, the court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale accordingly (31 & 32 Vict. c. 40, s. 3); and by sect. 4 the court, on the application of the parties interested individually or collectively, to the extent of one moiety or upwards in the property, shall, unless it sees good reason to the contrary, direct a sale, &c. (a); and now, by 39 & 40 Vict. c. 17, an action for partition under these Acts includes an action for sale and distribution of the proceeds, and the latter may be claimed without the former.

**Q.**—Describe, shortly, the steps in an action for sale in lieu of partition.

**A.**—A writ must be issued in the Chancery Division of the High Court, which may now claim a sale and distribution of the proceeds without claiming a partition (39 & 40 Vict. c. 17, s. 7); and the proceedings may be the same as in an ordinary action to judgment, whereof all the parties interested are before the court; it may direct a sale, if not an inquiry as to the parties interested is directed, and how, and a sale directed on further considerations; this is where the parties interested can be served with notice of the judgment; but where this is not convenient, by the above Act, at the instance of any party interested, the court may by order dispense with that service in special cases, and instead thereof may direct advertisements calling upon all such persons to come in and establish their claims in respect thereof within a certain time, after which they will be bound by the proceedings in the action as if they had been served with notice of the judgment, and the court may thereupon, if it thinks fit, direct a sale of the property and give all necessary directions, and the sale is carried out in the usual way; but, 1st, the purchase

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(a) The court has authority under this Act to order trustees to sell an estate and divide the purchase money between the parties entitled, without directing the sale to take place in chambers: (*Hayward v. Smith*, 20 L. T. Rep. N. S. 70.)

money must be paid into court ; 2nd, the court, by order, must fix a time at the expiration of which the proceeds will be distributed ; 3rd, the court shall direct such advertisements of the facts as it thinks necessary ; 4th, at the expiration of such time, if the interests of all persons interested have been ascertained, the court shall distribute the proceeds accordingly ; 5th, if not ascertained, it may distribute them with or without reservations, but excluded persons may recover subsequently from those so receiving their portions : (*Ib.*, s. 4.)

### CANCELLING, &c., OF DOCUMENTS.

*Question.*—In what cases will instruments be ordered to be cancelled, rescinded, or delivered up ?

*Answer.*—The Court of Chancery frequently cancelled or rescinded, or ordered to be delivered up, instruments which had answered the end for which they were created, or which were voidable, or which were in fact void. The jurisdiction exercised in cases of this sort was founded upon the administration of a protective or preventive justice. The party was relieved upon the principle *quia timet*, that is, for fear that such instruments might afterwards be vexatiously or injuriously used against him, when the evidence to impeach them might have been lost, or that they might already throw a cloud of suspicion over his title or interest : (Snell, Eq. p. 603, 4th edit.) (a)

*Q.*—When will the court set aside and cancel instruments which are voidable only ?

*A.*—In the following cases—

1. Where there is some actual fraud in the party defendant in which the party plaintiff has not participated.

2. Where there is some constructive fraud against public policy, and the party plaintiff has participated therein.

3. Where there is some constructive fraud against public policy, and, although the party plaintiff has participated therein, yet public policy would have been defeated by allowing the instrument to stand.

4. Where there is some constructive fraud in both parties, but they were not both of them *in pari delicto* : (Snell, 5th edit. 612.)

### INTERPLEADER.

*Question.*—What is the nature and effect of an interpleader ?

*Answer.*—It is an application by a person from whom two or more other persons, whose titles are derived one from the other, or from the same source, or adversely to each other, and whose rights he cannot readily determine, have claimed the same thing wherein he himself claims no interest ; and its object is to compel them to contest the matter between themselves without involving him in any vexatious litigation respecting it : (Sm. Man. sect. 740, and *ante*, p. 59 ; Evans, Ch. Pr. 441.)

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(a) The following is answered by the above : Give an instance of the circumstances under which an order of *quia timet* would be made.

**Q.**—What affidavit must the defendant make in support of an interpleader?

**A.**—See *ante*, p. 60.

**Q.**—Where a deposit is paid to an auctioneer at a sale, and there should arise a dispute between the vendor and purchaser, and an action is commenced against him by either for the deposit; what is the course to be pursued by the auctioneer to protect himself against their adverse claims?

**A.**—He must apply for an interpleader.

**Q.**—A. and B. claim property which is in C.'s hands, but in which C. has no interest. How can C. protect himself? If C. had himself any interest in the property, would it make any difference in the nature of the proceedings?

**A.**—If C. claims no interest in the property, on action brought against him he may interplead, and so obtain protection; but if he himself claims an interest in the property, he is then precluded from doing so; at least, this was formerly the rule in equity, but the common law practice now prevails, and this rule was never very strictly followed at common law, as carriers claiming a lien for freight could interplead: (see St. Eq. §§ 806 and note, 807 and note; Sm. Man. sect. 740, &c.)

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## INJUNCTIONS.

**Question.**—What is an injunction? And mention the different kinds of injunctions.

**Answer.**—An injunction was formerly a judicial writ, but is now a judgment or order (See Order L., r. 11) requiring a party to do or omit doing a particular thing. Injunctions were of two kinds: 1. Special injunction, by which parties are restrained from committing waste or injury to the property of others. 2. Common injunction, by means of which the Court of Chancery formerly stayed or controlled the proceedings in other courts, and which were formerly granted of course; but the practice with respect to common injunctions was assimilated to the practice with respect to special injunctions: (15 & 16 Vict. c. 86, s. 58; Evans, Ch. Pr. 431.) (a)

**Q.**—What is an interlocutory injunction?

**A.**—When the grievance sought to be restrained is very pressing, an *ex parte* application may be made and injunction applied for as soon as the writ is issued upon affidavit verifying the case, and in such case an interim order (or interlocutory injunction) until the motion comes on to be heard upon notice, is usually granted upon the terms of the plaintiff becoming liable for any loss occasioned thereby if it is improperly obtained: (Evans, Ch. Pr. 434.)

**Q.**—State in what cases the Court of Chancery would interfere by way of injunction?

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(a) By the 1873 Act, s. 24, sub-s. 5, no cause or proceeding in the High Court of Justice or before the Court of Appeal can now be restrained by prohibition or injunction: but any matter of equity may be relied upon by way of defence thereto, or the party may apply by motion in a summary way for a stay of proceedings.

A.—To stay proceedings in other courts; to prevent waste; the continuing of nuisances; pirating copyright; using trade marks; breaches of patents for inventions; quieting possession; publication of private letters; the sailing of a ship; to restrain the carrying on of a trade contrary to lawful covenants, &c.: (see Gold, Eq. 103 *et seq.*, 4th edit.; St. Eq. § 874 *et seq.*)

Q.—State generally and briefly the grounds or principles on which the Court of Chancery acted in granting injunctions.

A.—The grounds or principles upon which it acted in granting common injunctions, were to prevent injustice being done by the inequitable use of other courts; and in granting special injunctions to prevent irreparable injury. Also, because formerly there was no remedy or adequate remedy at law: (St. Eq. §§ 862, 864, &c.; *The Earl of Oxford's case*, 2 L. O. Eq. 504, 2nd edit.)

Q.—What were the general principles which regulated the Court of Chancery in granting or refusing injunctions *ex parte*?

A.—They were only granted in cases of really pressing danger; when the court was satisfied that if not granted at once the mischief intended to be prevented would be so prejudicial to the party moving that the court could not afterwards set him right. Nor could the motion be made after appearance: (Drew. Ch. Pr. 55; Evans, Ch. Pr. 434.)

Q.—Upon what terms is an *ex parte* injunction usually granted, and what remedy has a defendant for loss caused by the injunction in the event of the court having been misled as to the facts?

A.—An *ex parte* injunction is only granted in very pressing cases, and then only on the terms of the plaintiff undertaking to pay any damages the defendant may sustain if it has been improperly obtained; the remedy of defendant, if the court has been misled as to the facts, is to apply by motion on notice to the court to dissolve the injunction: (see generally Evans, Ch. Pr. 434.)

Q.—Can an injunction now be obtained to stay proceedings in an action; and, if not, what course should be taken by a defendant who considers himself aggrieved by proceedings commenced against him?

A.—An injunction cannot now be obtained in the Supreme Court to stay proceedings in an action, but where a defendant is aggrieved by proceedings commenced against him in the High Court of Justice or before the Court of Appeal, he is at liberty to apply to the said courts by motion in a summary way for a stay of proceedings, either generally or so far as may be necessary for the purposes of justice, and the court thereupon makes such order as may be just. (1873 Act, s. 24, sub-s. 5.) The application should be made to the division of the High Court in which the action is pending.

Q.—In what cases is the court empowered by the Judicature Act, 1873, to grant an injunction?

A.—By sect. 25, sub-sect. 8, an injunction may be granted by an interlocutory order of the court in all cases in which it shall appear to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the



court shall think just; and if it is asked either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass such injunction may be granted if the court shall think fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable.

**Q.**—What is a mandatory injunction, and where and under what circumstances will such an injunction be granted?

**A.**—A mandatory injunction is a judicial process, by which a person is required to do some act. Mandatory injunctions are very rare, and will only be granted where the act to be done is of a very simple and summary character, such as the removal of tiles improperly placed on the top of a chimney (*Hervey v. Smith*, 1 K. & T. 389); or where the injury to the plaintiff is of a very excessive and peculiar character: (*Isenberg v. East India Company*, 3 D. & S. 263.)

**Q.**—In exercising its jurisdiction by injunction does the court merely prohibit mischief, or can it also give compensation in respect of past mischief?

**A.**—The court may now not only grant an injunction against further mischief, but may, either in addition to or in substitution for such remedy, award damages for the past wrong.

**Q.**—How is an injunction obtained?

**A.**—A writ must be issued with the claim for the injunction indorsed; and, unless the order is applied for *ex parte*, a copy of the writ and a notice of the intended motion are served on the defendant. These proceedings having been taken, counsel moves the court, supported by sufficient evidence for the order. If the order is granted, it is drawn up, passed, and entered in the usual way, and personally served as soon as possible: (Evans, Ch. Pr. 434.)

**Q.**—Is the time when the party applying for an injunction first become acquainted with the circumstances on which the application is founded, material or immaterial? In either way of answering the question, give the reason.

**A.**—Yes; as, for example, where in case of a patent the patentee has lain by and allowed the violation to go on for a long time without objection or seeking redress. Because equity discountenances laches, and an injunction in such a case would not be a fit mode of redress under all the consequences: (see St. Eq. §§ 895, 896, 959 a; *Bovill v. Crate*, L. Rep. 1 Eq. 388.)

**Q.**—On an application for an injunction, will the omission by the party making such application to state fairly all the circumstances within his knowledge material to the case, involve any, and if any what, particular circumstances?

**A.**—If an injunction has been obtained on a misstatement or concealment of facts, the defendant may move to discharge the order: (Evans, Ch. Pr. 436; and see *Morgan v. M'Adam*, 15 L. T. Rep. N. S. 348.)

**A.**—When the grievance sought to be restrained is very pressing, the injunction may be applied for after the writ is issued upon an affidavit verifying the plaintiff's case, without either serving the defendant with a copy of the writ or notice of motion: (Evans, Ch. Pr. 439.)

A.—In the High Court of Justice, 1881, A. No.  
V.C., Chancery Division,  
A. v. B.

**C. D.,  
Solicitor for the said Plaintiff.**

(See Daniell's Ch. Forms.)

A.—The writ must be issued with the claim for the injunction indorsed, in the usual way; and as the motion is made *ex parte*, the case must be verified by affidavit. But the defendant is not served either with a copy of the writ or notice of motion. Counsel moves the court, supported by the above affidavit, and production of the writ. The registrar draws up the order and gets it entered. And as soon as the order is pronounced the plaintiff may serve the defendant with a written notice, stating that the injunction has been granted, and that the order will be served as soon as ready, which will be sufficient to restrain the defendant: (Evans, Ch. Pr. 434.)

A.—The solicitor should apply at once for copies of the affidavits filed by the plaintiff, and to these he may either reply by affidavits contradicting them, or he may content himself by cross-examining the plaintiff's witnesses in the examiner's office; or he may take both courses concurrently. If there is not sufficient time for either of these courses, he gives counsel a brief to oppose the motion, and instructs him to appear and ask for time to answer the affidavit: (see Drew. Ch. Pr. 74.)

**Q.**—The fifth volume of "Macaulay's History of England" is published during the long vacation after the courts have risen. A bookseller pub-

lishes a pirated edition ; the owner of the copyright seeks your advice on his remedy. State the course which you would advise him to adopt so far as the injury is remediable in equity ; the proceeding, step by step, for obtaining such remedy, and the time within which it can be obtained.

A.—I should advise him to apply for an *ex parte* injunction, in the mode above pointed out. The motion must be made to the vacation judge. Special directions are, however, given each vacation as to the mode of applying for injunctions, the application being generally made at chambers. Under the most favourable circumstances, two or three days must elapse before the injunction can be obtained : (see Ayck. Pr. tit. "Injunctions," 9th edit.) (a)

Q.—A., in the course of a confidential employment by your client B., is entrusted by the latter with an important secret in connection with such employment, which he threatens to make public ; is, or is not, this a case in which the court will prevent the disclosure threatened ? and, if so, state the remedy which you would advise B. to adopt.

A.—The court will prevent the threatened disclosure, on the ground of irreparable mischief. I should therefore advise B. to issue a writ against A. for an injunction : (St. Eq. § 952.)

Q.—Has the court power to grant an injunction restraining the committee of a club from expelling a member, and, if so, when will it exercise such power ?

A.—It has power, and will do so in cases where the committee is acting unreasonably or *ultra vires* : (see *Labouchere v. Earl of Wharnclyff*, 13 Ch. Div. 346 ; *Dawkins v. Antrobus*, L. Rep. 17 Ch. Div. 617.)

Q.—Has a party by whom *private letters* have been written and sent to another person any property, absolute or qualified, in the letters so sent as against the person receiving them ? If so, under what circumstances, to what extent, and in what way can he assert his title to this species of property ?

A.—The property which a receiver of private letters has in them is of a qualified kind ; for the property beyond the purpose for which the letter was sent is in the sender. The court will therefore restrain by injunction the publication of private letters, whether of a literary character or otherwise, where the publication is attempted without the consent of the author : (Sm. Man. sect. 776.)

Q.—A. B., being in partnership with C. D., is about to draw and negotiate bills of the firm for his private purposes ; what course would you advise C. D. to adopt for his security ?

A.—To apply to the court for an injunction (in the mode before detailed) to restrain A. B. from negotiating the bills : (St. Eq. § 669.)

Q.—Under what circumstances will the court by injunction stop a sale by fiduciary vendors ?

A.—In any case where the sale would not be authorised by the true scope of the trust ; but in the case of a mortgagee, a sale by him will not

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(a) When the court is sitting, the injunction might, with expedition, be obtained in one day.

be restrained merely because of a low price or on account of the time being inconvenient: (see Snell, p. 148; *Warner v. Jacob*, L. R. 20 Ch. Div. 220.)

Q.—A lessee of a farm is under covenant not to plough up meadow land or to remove hay or straw off the farm; the lessee takes steps which indicate the intention to plough up meadow, or to remove hay or straw; what remedy, if any, has the lessor to prevent this?

A.—The remedy the lessor has is by issuing a writ for an injunction to restrain the lessee from so ploughing, &c.: (see St. Eq. §§ 721, 959, b.)

Q.—How does the owner of property acquire a right, as against an adjoining owner, to the enjoyment of light and air? Under what circumstances will the court interfere, by injunction, to restrain any interference with such right?

A.—He acquires the right by uninterrupted enjoyment for twenty years, unless the enjoyment arose by consent in writing: (2 & 3 Will. 4, c. 71, s. 3; *Ld. St. Leonard's Handy Book*, 196, 6th edit.) When the right is indefeasible, the court will prevent any interference with such light and air which would *materially* injure the plaintiff, provided he has not acquiesced in the obstruction or been guilty of laches: (*Jacomb v. Knight*, 8 L. T. Rep. N. S. 621; *Johnson v. Wyatt*, 9 *ib.* 618; *Jackson v. The Duke of Newcastle*, 10 *ib.* 635; L. Rep. 1 Eq. 242.)

Q.—To what rights as to light is the owner of a house entitled who has altered the ancient lights: by enlarging or adding to the number of windows?

A.—So far as the ancient lights remain, he retains his former rights, and, if stopping the new lights would interfere with the old, that cannot be done: (*Tapling v. Jones*, 11 H. of L. Cas. 290.)

Q.—An adjacent owner opens a new window completely overlooking the garden of B., who considers the enjoyment thereof to be interfered with by such window. Has B. any, and what, remedy?

A.—B. has no legal remedy; the invasion of B.'s privacy by A. is no wrong. However, B. may build, and so obstruct A.'s light: (*Latham on Window Lights*, 126 *et seq.*, 324.)

Q.—A. builds houses with lights overlooking gardens at the back belonging to him, and let with the houses, but divided from them by a passage. After the houses have been erected more than twenty years, A. sells the garden land to B. How near to his boundary, and to what height can B. erect buildings?

A.—B. may (unless restrained by the terms of his grant) erect any buildings he pleases upon the land so sold to him, however much they may interfere with the lights of the vendor's house: (see *The Curriers Company v. Corbett*, 2 Drew & Sm. 358; 1 Dart. V. & P. 360, 5th edit.)

Q.—A. contracts with B., in general terms, that he will cease to carry on a trade, but subsequently violates his contract; has B. any remedy in equity? And give the reason for your answer.

A.—B. has no remedy; because contracts in *general* restraint of trade are void, as they tend to discourage industry, enterprise, and just competition: (see St. Eq. § 292.)

**Q.**—A patentee issues his writ against one whom he charges with an infringement of his patent by the manufacture and sale of articles protected by the patent. What must he prove to support his case, and to what relief will he be entitled if he succeed?

**A.**—The patentee must prove his right to the patent in the mode above pointed out, and the breach of the patent. The court will then grant an injunction, and decree an account of any profits the wrongdoer has made by a sale of the articles protected by the patent : (see *St. Eq. ss. 930 et seq.* ; *Sm. Man. s. 771.*) And damages may also be awarded.

**Q.**—Will the court interfere to prevent the unauthorised use of trade marks, and in what cases ; and what must the plaintiff prove in order to succeed ? And what relief will the court give ?

**A.**—The court will interfere if a person has already acquired a reputation in trade by them—in fact, a property therein. The plaintiff must prove (1) that he has an exclusive right to the trade mark ; and (2) that the defendant has *knowingly* used it so as to prejudice the plaintiff's custom and injure his business. The court will then grant an injunction against the further unlawful use, and compel the defendant to account for all profits made thereby ; (*Edleston v. Edleston*, 7 L. T. Rep. N. S. 768 ; *Hall v. Burrows*, 33 L. J. 204, Ch.) So damages may be granted.

**Q.**—Is there any property in a trade mark ? And on what principle does the court interfere to restrain the improper use of a trade mark ?

**A.**—Formerly there was no property in a trade mark. The principle on which the court interfered to restrain the improper use of trade marks was that the defendant had imitated the plaintiff's marks for the purpose of fraudulently passing off his own goods as the plaintiff's. But see 25 & 26 Vict. c. 88, and 38 & 39 Vict. c. 91 ; also *Burgess v. Burgess*, 3 De G. M. & G. 896. The latter Act confers a property in them after registration.

**Q.**—Will the court grant an injunction to restrain a public nuisance, and if so, at whose suit ; and is it in all cases necessary that the party applying for the injunction has sustained some special or particular damage ?

**A.**—An injunction will be granted in the case of a public nuisance, and the usual and proper course is to issue a writ in the name of the Attorney-General, whose consent must be obtained for that purpose ; but this is not necessary if there be a special or individual grievance arising out of a common injury which affects a certain person or certain individual more than others, in which case a writ may be issued by such person or individuals : (*Dan. Pr. 1586*, 6th edit.)

**Q.**—What is waste, and what are the acts which constitute waste ?

**A.**—Waste is the destruction, or material alteration, by a tenant for life or years, of any part of the tenement, to the injury of the person entitled to the inheritance. There are two kinds of waste—*voluntary* and *permissive*—the first by the tenant's voluntary act, as where he pulls down a house ; the other by his default, as by suffering it to remain out of repair : (see notes to *Bowles' case*, L. C. Conv. 90, 2nd edit.) It is also divided into legal and equitable, as stated *infra*.

**Q.**—What is meant by “equitable waste?” Will a tenant for life without impeachment of waste, be restrained from committing it?

**A.**—Equitable waste is such injurious acts as were not punishable as waste at law; as where a tenant for life without impeachment of waste pulled down or defaced the family mansion, or felled ornamental timber: but the Court of Chancery would restrain him by injunction: (see *Sm. Man.* 410, 10th edit.; *Garth v. Sir J. H. Cotton*, 1 L. Eq. 559, 2nd edit.)

An estate for life without impeachment of waste will not confer upon the tenant for life any legal right to commit equitable waste, unless an intention to that effect expressly appear upon the instrument creating such estate: (1873 Act, s. 25, sub-s. 3.)

**Q.**—State some of the ordinary cases in which the court will interfere to prevent the committing of waste.

**A.**—The court will restrain, by injunction, the committal of voluntary waste; as where a tenant for life pulls down buildings or fells timber. But the court has no means of interfering in case of permissive waste by a tenant for life: (*Sm. Man.* 410, 10th edit.) But an account would be granted where there is an express covenant to repair: (*Marsh v. Wells*, 2 S. & S. 87.)

**Q.**—Will the court interfere before the defendant’s appearance to stay waste?

**A.**—Yes; but the application for the injunction must be supported by affidavit, verifying the case. And in such cases leave will be granted to serve notice of motion for the injunction *before* the writ is issued: (*Evans*, Ch. Pr. 434.)

**Q.**—Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, can such tenant for life legally cut and sell the same; if so, with whose consent, and who would be entitled to the proceeds of sale? Give the authority for your answer.

**A.**—Yes, on obtaining the consent of the trustees of the settlement or an order of the court. Three-fourths of the net proceeds must be set aside as capital money arising under the Act, and the other fourth will go as rents and profits: (45 & 46 Vict. c. 38, s. 35.)

**Q.**—A. is tenant for life without impeachment of waste; on his death the remainderman ascertains that he has, during his life, cut down timber—including ornamental timber—for repairs and sale, has pulled down the manor house, and allowed farm houses to fall into disrepair, has broken up pasture, and has opened mines and quarries. Has the remainderman any and what remedy in respect of any and which of those acts or neglects? And what action, if any, could he have taken during the lifetime of the tenant for life?

**A.**—The remainderman, after the death of the tenant for life, may bring an action for damages against his representatives for his cutting down the ornamental timber, for pulling down the manor house, for breaking up the pasture land if it is the park (but not otherwise). The other acts mentioned a tenant for life without impeachment of waste has a right to commit. During the lifetime of the tenant for life he could



have issued a writ for an injunction and damages as well in respect of such of the acts as constituted equitable waste.

*Q.*—Will the court restrain a tenant for life without impeachment of waste from cutting down any, and what timber; and, supposing such tenant for life to cut down such timber, and to sell the same, to whom will the money produced by such sale belong?

*A.*—The court will restrain him from cutting down timber which is planted and grown for ornament or shelter of the property; this being termed equitable waste. If he should cut down such timber and sell it, the proceeds will belong to the remainderman or reversioner. The proper remedy is to issue a writ for an injunction and account: (St. Eq. §§ 515, &c.; *Garth v. Sir J. H. Cotton*, *sup.*; *Seagram v. Knight*, L. Rep. 2 Ch. App. 628.)

*Q.*—What is the position of a tenant for life as regards responsibility for improper exercise of the powers given to him by the Settled Land Act, 1882?

*Q.*—In relation to the exercise of his powers he is to be deemed to be in the position and to have the duties and liabilities of a trustee for the parties interested: (sect. 53.)

*Q.*—How is an injunction put in force?

*A.*—By serving a copy of the order or judgment on all the parties enjoined; and on breach thereof, moving the court that the parties may stand committed: (Evans, Ch. Pr. 436.)

*Q.*—Describe the proceedings against a defendant in case of breach of an injunction.

*A.*—Serve the defendant with notice of the intended motion, and then move the court that he may stand committed for his contempt. If the order is granted it is drawn up, passed and entered, after which it is handed to the messenger of the court, who procures the Lord Chancellor's warrant, and thereupon the defendant will be committed to prison: (Evans, Ch. Pr. 437.)

### WRIT OF NE EXEAT REGNO.

*Question.*—In what cases, and upon what grounds, is a writ of *ne exeat regno* granted?

*Answer.*—In those cases in which the plaintiff is apprehensive that the defendant is about to leave the kingdom for the purpose of avoiding the plaintiff's demands. It can only be obtained when the plaintiff has an equitable money demand actually due and certain in nature, except in the case of an order for alimony, and then only for arrears and costs actually due, or for a sum due on an admitted balance of an account: (Evans, Ch. Pr. 106; Sm. Man. sect. 783.)

The plaintiff must now show, as in cases under sect. 6 of the Debtors Act, 1869, that the absence of the defendant will materially prejudice him in the prosecution of his action: (see Jessell, M.R., in *Driver v. Beyer*, 41 L. T. Rep. N. S. 393.)

*Q.*—In case of a demand for which the debtor cannot be arrested, and

the debtor is about to quit the country, will equity interfere to prevent his so doing? And what are the necessary proceedings to be taken for that purpose?

A.—In such case a writ of *ne exeat regno* must be applied for. An ordinary writ must be first issued. The application must be made to the court by counsel, and must be supported by affidavit, verifying the material allegations in the case. When the order is granted it is drawn up, passed, and entered in the usual way; the writ is then prepared, and forwarded to the undersheriff of the county into which it issues, by whom it is executed: (Evans, Ch. Pr. 106; and see *Sichel v. Raphael*, 4 L. T. Rep. N. S. 114.)

Q.—State the origin of the jurisdiction assumed by courts of equity in granting writs of *ne exeat regno*.

A.—It was originally a prerogative writ applicable only to the purposes of state. It latterly became a part of the ordinary process of the court, and might be considered as a species of equitable bail: (Ayck. Pr. 291, 9th edit.; Sm. Man. sect. 781.)

## RECEIVER.

*Question.*—What are the ordinary cases in which a receiver is appointed? And state any special cases.

*Answer.*—The ordinary cases are those in which the action (which must be pending except in the case of idiots and lunatics) arises out of claims by parties having equitable interest in the subject, as in partnership transactions, between mortgagor and mortgagee, and the like: (St. Eq. §§ 829, 830.)

As to special cases: a receiver was appointed of a Government pension, the trustees being out of the jurisdiction: (Ayck. Pr. 642, 9th edit.) So where there is a manifest breach of trust by an executor by wasting the property, a receiver will be appointed: (see Gold. Eq. 213, 4th edit.) But now, by the 1873 Act, s. 25, sub-s. 8, a receiver may be appointed by interlocutory order of the court in all cases where it appears just or convenient.

Q.—Will the court appoint a receiver at the instance of annuitants or equitable creditors when the property is legal and judgment creditors have taken possession by writs of *elegit*? What is the nature of the receiver's office and duty?

A.—The court formerly would not, although under the new practice it might, appoint a receiver where the annuitant has a right of entry or distress, but the court would always appoint a receiver in favour of the equitable creditors, not disturbing the rights of any of the judgment creditors in possession: (see Dan. Ch. Pr. 1672, 6th edit., note s.)

The receiver is an officer of the court, and his duties are to receive the rents, issues, and other profits of land or other things in question in an action, to pass his accounts, and pay in the balances at the times appointed: (Sm. Man. sect. 787 *et seq.*)

Q.—Will the court appoint a receiver at the instance of a second

mortgagee when the first mortgagee is not in possession? Will it do so when the first mortgagee is in possession? Explain the reason for the difference if there is any.

A.—The court will grant a receiver at the instance of a second incumbrancer in all cases in which the first incumbrancer is not in possession, but will not do so, unless under very particular circumstances, when he is in possession. The reason for the distinction is that the first mortgagee has the legal right to possession, and to collect the rents, &c., if he thinks proper: (see Dan. Ch. Pr. 1666, 6th edit.)

Q.—Is any, and what, security required from a receiver in an action?

A.—Yes, unless otherwise ordered, the person so to be appointed is first to give security, to be allowed by the judge to whose court the action is attached (usually double the amount of the property or income), and to be taken before a person authorised to administer oaths, duly to account for what he shall receive, &c.: (Evans, Ch. Pr. 750.)

Q.—Give instances of persons who, in an action praying for a receiver, are disqualified from being appointed such receiver.

A.—A peer cannot be appointed a receiver; neither can the solicitor or a party in the action be appointed as a rule: (Evans, Ch. Pr. 750.)

Q.—Is bankruptcy a disqualification for acting as a receiver, trustee, or executor?

A.—Bankruptcy is in general a disqualification for a receiver, and also for a trustee whenever, from the nature of the trust, he will have considerable sums under his control: (*Re Barker*, 1 Ch. D. 43.)

An executor, though bankrupt, cannot be removed: (see 1 Will on Exors. 644, 6th edit.)

Q.—On an original application for the appointment of a receiver, to whom should the application be made, and is there, or not, any difference in the practice when it is sought to supply a vacancy in the office?

A.—The original application for the appointment of a receiver is made to the court, but where it is merely to supply the place of a receiver already appointed, whose office has become vacant, it may be made at chambers, and the same where the application is made by consent: (Evans, Ch. Pr. 748; *Booth v. Colton*, 18 L. T. Rep. N. S. 384.)

Q.—What are the powers of a receiver? Can he distrain for rent in arrear, cut timber, give notice to quit, or let the estate without the authority of the court?

A.—His powers are very limited: he must apply from time to time to the court for authority to do such acts as may be beneficial to the estate. He may, without leave, distrain for rent within the year. If more be due, an order is necessary. He cannot, without order, cut timber. If he has a general authority to let lands from year to year, he may give notice to quit. He may, with the approbation of the judge, let the estate by parol from year to year to several tenants without order. Letting for longer periods must be with the sanction and order of the judge at chambers: (Sm. Pr. 1032, 1033, &c., 7th edit.; Wood, L. & T. 51, 306, 393, 10th edit.)

Q.—If a receiver appointed by the court finds himself in circumstances

of difficulty in regard to the management of the property, how should he proceed to obtain the direction of the court?

A.—This may be done in certain cases by summons at chambers, as for liberty to let the estate, &c.; in other cases the application is made to the court on motion: (Sm. Pr. 1033, &c., 7th edit.)

Q.—Can a receiver bid at a sale by auction made under a judgment of the court?

A.—No; the court refuses to give liberty to receivers to bid at the sale: (Ayck. Pr. 519, 9th edit.)

Q.—If previously to a judgment a receiver is appointed, and the judgment does not in any way notice the appointment, does the omission affect the continuance of the receiver?

A.—It has been considered that unless the receiver is continued by the judgment, his powers will cease, but this appears not to be the case: (Dan. Ch. Pr. 1715, 6th edit.)

Q.—Is a receiver liable under any, and what, circumstances, for moneys belonging to the estate deposited by him with a banker, who afterwards fails? (a)

A.—He is liable for any loss occasioned by the failure of a banker with whom he deposits moneys for security, if the deposits be made in such a way that he parts with the absolute control over the fund, or if it is mixed up with his own money in the banker's hands: (Dan. Ch. Pr. 1702, 6th edit.)

### INFANTS. (b)

*Question.*—What protection does the court give to infants having property within the jurisdiction? and in what cases will it deprive a father of the custody of his children, being minors?

*Answer.*—The court will appoint a suitable guardian to an infant where there is no other who will or can act, at least where the infant has property. It will also deprive the parent of the custody of his children on proof of gross ill-treatment or that the parent is living in gross immorality, or otherwise acts in a manner injurious to the morals or interest of his children. The court will also prevent the estate of the infant from being wasted: (see Sm. Man. sect. 794, &c. (c))

Q.—Construe and explain what is meant by *sui juris*.

A.—This term in English law means "of full legal capacity" (strictly construed "of his own power"), and is used in contradistinction to persons under the various disabilities of infancy, coverture, lunacy, &c. In Roman law it was opposed to the phrase *alieni juris*, meaning persons out

(a) Also asked thus: If a receiver appointed by the court finds it necessary to pay money into a bank for safe custody, what precaution ought he to take to avoid being made liable in case of the failure of the bank?

(b) The wardship of infants and the care of infants' estates are assigned to the Chancery Division by the 1873 Act, s. 34, sub-s. 3.

(c) In questions relating to the custody and education of infants, the rules of equity are to prevail: (1873 Act, s. 25, sub-s. 10.)

of the "*potestas*" of a father or master as opposed to persons subject to such *potestas*: (Brown's Law Dictionary, 2nd edit., 515.)

Q.—What is the course of proceeding if, upon default made by a defendant in not appearing to a writ it appears to the court the defendant is an infant?

A.—In such case the court may, upon the plaintiff's application, order that some proper person be assigned guardian of such infant defendant, by whom he may appear and defend the action. It must be shown that a copy of the writ was duly served, and that notice of such application was after the expiration of the time allowed for appearing, and at least six clear days before the hearing of the application, served upon or left at the dwelling-house of the person under whose care such defendant was at the time of serving the writ, and if the defendant is not residing with his father or guardian, also upon the father or guardian of the infant, unless the last-mentioned service be dispensed with by the court: (Ord. XIII.)

Q.—What notice is necessary before moving to assign a guardian to an infant defendant?

A.—See preceding answer.

Q.—Can a father or mother appoint a guardian to their children?

A.—The 12 Car. 2, c. 24, gives the father power to dispose of, by testamentary disposition, (a) the guardianship of the children, which may extend, if males, to the age of twenty-one years; if females, to that age or marriage, whichever may first happen. A mother cannot appoint a testamentary guardian, although she may be appointed guardian: (Gold. Eq. 151, 4th edit.)

Q.—In the absence of a guardian so appointed, what is the summary course of proceeding after the father's death for the appointment of a guardian, and procuring an allowance for the infant's maintenance?

A.—The orders for the appointment of a guardian (not being *ad litem*) and for maintenance are obtained on summons at chambers. Evidence must be produced to show: 1. The age of the infant. 2. The nature and amount of his fortune and income. 3. What relations he has: (see Ord. LV., r. 25.) 4. That the proposed guardian is a fit and proper person, that he is willing to act, and has no interests opposed to those of the infant.

Q.—Can an infant appoint a testamentary guardian to his children, and if so, by what document can it be done?

A.—An infant not being able to make a will (1 Vict. c. 26, s. 7) cannot appoint a testamentary guardian to his children. He can, however, appoint one by deed: (12 Car. 2, c. 24.)

Q.—State some cases in which the Court of Chancery was accustomed to commit the custody of infants to persons to act as guardians during their father's life.

A.—Wherever the father's conduct was such that it was considered

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(a) The statute says "by deed or will," but this has been held to mean a testamentary instrument in the form of a deed or will: (see Chit. Stats. by Welsby and Bevan, 571, n. d., 2nd edit.)

detrimental to the best interest of the infants to remain in his care: (see the cases of *Shelley*, Jac. 266 n.; *Wellesley*, 2 Bligh N. S., and *Besant*, 48 L. J., N. S. 497; and see Haynes' Outlines, 135, 4th edit.)

Q.—Where it is not shown that the father is unfit to remain the custodian of a child, or that his so remaining would be an injury to the child, can the court order such child to be taken from him and delivered to the mother? Give a reason for your answer.

A.—Yes; as by Talfourd's Act (2 & 3 Vict. c. 54), amended by 36 Vict. c. 12, the court may order that the mother have custody of her children up to the age of sixteen years, subject to any regulations the court thinks fit to impose. What was formerly the common law right of the father is now subject to the discretionary power of the judge: (see observations of Master of the Rolls, in *Re Taylor*, 46 L. J. 399, Ch.)

Q.—In what cases would the Court of Chancery have permitted the mother of children in the father's sole custody to have access to them? And in what cases to have the children delivered to her custody?

A.—The mother would be permitted to have access in all cases where she was not living in open crime; children under sixteen may now be committed to her custody wherever the court thinks it would be for their interest, or in case of an atheistical father: (see *Shelley v. Weskwake*, Jac. 266, n., and *Wellesley v. Duke of Beaufort*, 2 Russell; and 36 Vict. c. 12; Haynes, 136, 4th edit.)

Q.—Would a stipulation in a deed of separation that the wife should have the custody of the children be valid? Give the authority for your answer.

A.—Yes; but the court would not be bound to enforce it, unless of opinion that it is for the benefit of the infant: (36 Vict. c. 12, s. 2; and see *Re Besant*, 48 L. J. 501, Ch.)

Q.—How is an infant made a ward of court, and what is the effect of it as regards his person and property?

A.—He may be made a ward of court either by writ, or summons at chambers on the above-stated evidence. After this, any act affecting his person or property must be done under the express or implied direction of the court, otherwise the act will be treated as a violation of the authority of the court, and the offending party will be arrested for contempt, and punished by attachment: (see Sm. Man. sects. 801, 802.)

Q.—What constitutes an infant a ward of court, and what are some of the advantages of placing an infant in that position?

A.—Properly speaking a ward of court is a person who is under a guardian appointed by the court; but whenever an act is instituted in the court relating to the person or property of an infant, he is treated as a ward of court. The court will appoint a suitable guardian to an infant made a ward of court, where there is no other who will or can act, at least where the infant has property. It will also remove a guardian on good cause being shown, and will also deprive the parent of the custody of his children on proof of gross ill-treatment, or that the parent is living in gross immorality, or otherwise acts in a manner injurious to the morals or interests of his children. The court will also order them suitable



maintenance, and will arrest for contempt and punish by attachment as a violation of its authority any person who shall do any act affecting the person or property of the infant : (Sm. Man. sect. 801.)

*Q.*—Can a valid settlement of the real and personal estates of infants be made upon their marriage? And, if so, how?

*A.*—Infants may, with the approbation of the court, obtained on petition in a summary way (*a*), make valid and binding settlements, or contracts for settlements, of their real or personal estates on their marriage. But this Act does not extend to male infants under twenty, or to female infants under seventeen years of age : (see 18 & 19 Vict. c. 43, *et ante*, p. 349.)

*Q.*—A. desires to marry a female ward of court; what steps must be taken to obtain the sanction of the court, and on what terms will it be granted?

*A.*—To obtain the sanction of the court a petition must be prepared, presented, and, if necessary, served. On the hearing of the petition the matter will be referred to chambers for the judge's chief clerk to inquire whether the match is suitable, and what settlement should be made. These inquiries having been completed, and the settlement approved by the conveyancing counsel to the court, the chief clerk makes his certificate (which is approved and filed), and the court upon this certificate gives its sanction to the marriage upon the terms that the intended husband makes the settlement required by the court : (Evans, Ch. Pr. 423.)

*Q.*—What are the usual trusts of a settlement of the property of a ward of court on her marriage with a gentleman who brings little or no property into the settlement?

*A.*—They would usually be these : To trustees to the separate use of the wife for her life without power of anticipation ; then to the husband for his life or until bankruptcy, &c., followed by a power to appoint to the children of the marriage, and a special provision for the children in default of appointment. The ultimate trusts for the wife's heir or next of kin according to the nature of the property : (see more fully *ante*, tit. "Settlements.")

*Q.*—In what manner are the trusts of a marriage settlement to be performed when the deed has been lost or destroyed?

*A.*—Secondary evidence in the shape of a copy, proved to be correct, will be admitted as evidence of the original settlement (see Drew. Ch. Pr. 113), and the trusts may be performed from such copy ; for where the contents of a lost or destroyed instrument are proved, the party will receive the same benefit as if the instrument were produced, and, if necessary, the court will compel a discovery : (see St. E. §§ 83, 84, 254.)

*Q.*—Upon the marriage of an infant minor, without the consent of the court, what is the consequence to persons concerned in, assisting, or procuring such marriage ; and what course does the court usually adopt towards them?

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(*a*) All causes or matters under any Act of Parliament by which exclusive jurisdiction was given to the Court of Chancery, or any judge thereof (except appeals from the County Courts), are assigned to the Chancery Division : (1873 Act, s. 34, sub-s. 2.)

A.—The husband and all others concerned in aiding and abetting the act are guilty of a contempt of court, even though ignorant that the infant was a ward of court; and may be punished by attachment: (*Eyre v. Countess of Shaftesbury*, 2 L. O. Eq. 528, 2nd edit.; Sm. Man. sect. 811.)

Q.—If an infant son during his father's lifetime becomes entitled to property, will the court direct the income, or any part of it, to be applied for the maintenance and education of the infant, and by what will the court be guided; and is it necessary to institute an action for the purpose of obtaining its decision? Would the same rule apply if the infant had no parent living or only a mother; and, if not, why not?

A.—If the infant has a father living capable of maintaining him according to his expectations, the court will not make an order for an allowance to the infant. If the infant has no father, or no father able to maintain him according to his expectations, then, without reference to the 44 & 45 Vict. c. 41, s. 43, the court will make an order for an allowance for maintenance, and this, irrespectively of any property the mother may have for her separate use or otherwise: (and see 33 & 34 Vict. c. 93, s. 14.) The order for maintenance is obtained without an action by summons at chambers, showing the infant's age, property, relations, &c.: (see Dan. Pr. 1122-1128, 6th edit.; Sm. Man. sect. 801, &c.)

Q.—When may trustees apply the income of their infant *cestuis que trust* property for the maintenance of such infants in the absence of any express trust?

A.—By the 44 & 45 Vict. c. 41, trustees holding property, whether absolutely or contingently, for infants may, in their discretion, pay the whole or part of the income of such property to the infant's parent or guardian (if any) or otherwise apply it for the maintenance, education, or benefit of the infant, whether there be any other fund applicable for this purpose, or any other person bound to provide for such maintenance or education or not, unless a contrary intention is expressed in the instrument under which the interest of the infant arises: (sect. 43.)

Q.—When a railway company purchases land from the vendor under disability, how is the purchase money disposed of when under, and when above the limit of 200*l.*?

A.—When the sum to be paid exceeds 200*l.* it must be paid into the bank in the name and with the privity of the Accountant (now Paymaster) General of the court in England, if the same relate to lands in England or Wales, or the Accountant-General of the Court of Exchequer in Ireland if the same relate to lands in Ireland, *ex parte* the promoters of the undertaking in the matter of the special account. If the sum shall not amount to the sum of 200*l.*, and shall exceed 20*l.*, the same may be either paid into the bank or paid to two trustees to be nominated by the guardians, husbands, committees, or trustees of the parties entitled to the rents and profits of the land. If the sum is under 20*l.*, then it may be paid direct to the said guardians, husbands, committees, or trustees of the parties entitled for their use: (see 8 Vict. c. 18, s. 69, 71, 72.)

Q.—What are the investments prescribed by the Lands Clauses Con-

solidation Act for the purchase money of the land of a party under disability, and how is it dealt with in the meantime?

A.—The money is to be paid into the Bank of England, and until it can be applied as stated *infra*, it may be invested in the Three per Cent. Consols, Reduced Annuities, or Government or real securities. It, ultimately, may be applied (1) in redemption of land tax; or (2) in paying off incumbrances on lands settled to the like uses as the lands sold; or (3) in the purchase of other lands to be settled to the same uses as the lands sold; or (4) if paid in under this Act as the court shall direct; or (5) in payment to the person becoming absolutely entitled: (8 Vict. c. 18, ss. 69, 70.)

Q.—What rule does equity observe regarding the enforcement of contracts entered into by infants or married women?

A.—The court will not enforce their contracts either for or against them by specific performance, for the remedy must be mutual: (see Gold. Eq. 180, 4th edit.; St. Eq. § 787.) But a married woman is now liable to the extent of her separate estate: (45 & 46 Vict. c. 75, s. 1.)

Q.—How does an infant sue, and is there any difference in the mode of suing when the infant has or has not a testamentary or other guardian?

A.—He does so by next friend (Ord. XVI., r. 16), whether he has a guardian appointed by the court or a testamentary guardian. The guardian would usually be such next friend; but any one, even a mere stranger, may be named, and the action be carried on without the knowledge of those who have the care of the infant. However, the next friend must first sign a written authority to the solicitor to be filed with the copy writ: (Dan. Pract. 104, 6th edit.)

Q.—Can or cannot a writ be issued on behalf of an infant without his consent? And if so, what course may the court adopt to see whether it be for his benefit; and if not, what course will the court adopt?

A.—Anyone may issue a writ on behalf of an infant without his consent (Mit. Pl. 28; Dan. Ch. Pr. 108); but the court has the power to direct an inquiry at chambers to see whether the action be for the infant's benefit, and will stay or dismiss proceedings which appear to be detrimental to his interest: (see *Clayton v. Clarke*, 2 L. T. Rep. N. S. 302; *id.* 3 L. T. Rep. N. S. 723, 725; *Townsey v. Groves*, 1 *ib.* 778.)

Q.—Describe shortly the nature of the office, duties, and responsibilities of the next friend to an infant in an action.

A.—The next friend, who is usually the nearest relation, of the infant is chosen to conduct the action on the infant's behalf, as he cannot do so in his own right. The next friend must first sign a written authority to the solicitor for that purpose to be filed with the copy writ, and is responsible for the conduct of the action and for costs: (Evans, Ch. Pr. 574.)

Q.—How is a writ of summons served on an infant defendant, and how should the plaintiff proceed in default of appearance?

A.—When an infant is a defendant to the action, service on his or her father or guardian, or, if none, then upon the person with whom the

infant resides, or under whose care he or she is, shall, unless the court or judge otherwise orders, be deemed good service on the infant; provided that the court or judge may order that service made or to be made on the infant shall be deemed good service: (Ord. IX., r. 4.) Where no appearance has been entered to a writ of summons for a defendant who is an infant, the plaintiff may apply to the court or a judge for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action. But no such order shall be made unless it appears, on the hearing of such application, that the writ of summons was duly served, and that notice of such application was, after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such writ of summons, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of his father or guardian, if any, of such infant, unless the court or judge, at the time of hearing such application, shall dispense with such last-mentioned service: (Ord. XIII. r. 1.)

Q.—How does an infant defend an action?

A.—If a writ be issued against an infant, he cannot defend the action until a guardian *ad litem* has been appointed him: (Ord. XVI., r. 16.) No order for the appointment of such guardian is necessary, but the solicitor applying to enter the appearance must make and file an affidavit in the form given in the Appendix A., Pt. II. of the Rules: (*ib.* r. 18.)

Q.—Can admissions be made on behalf of an infant who is a party to an action?

A.—No; a plaintiff is bound to prove his whole case against an infant: (Ord. XIX., r. 17; Evans, Ch. Pr. 419.)

Q.—How do you proceed when infants are to be served with notice of a judgment?

A.—The notice is to be served in the same manner as the writ of summons in an action: (Ord. XVI., r. 44; Evans, Ch. Pr. 478.)

Q.—State how you would proceed to obtain liberty to attend the proceedings in an administration action on behalf of an infant who has been served with notice of the judgment.

A.—It is sufficient to have an appearance entered by his guardian *ad litem*: (Ord. XVI., r. 41.)

Q.—Is the judgment of the court binding in any, and if any in what, cases on a party to the cause, who is a minor?

A.—Yes. If a plaintiff, he is equally bound as a person of full age; but if defendant, he has a day given to show cause against the judgment, usually limited to six months after he has attained the age of twenty-one years (*Gregory v. Molesworth*, 3 Atk. 625); as in a foreclosure action against an infant; but if the court has decreed a sale, that binds even an infant defendant: (Evans, Ch. Pr. 485.)

Q.—How must a plaintiff proceed to make a judgment binding upon an infant?

A.—Upon the infant coming of age he should be served with a subpoena to show cause; and on the return of the subpoena, and the six months having elapsed, the plaintiff moves, upon an affidavit of service, and a certificate of baptism, and the registrar's certificate of no cause shown, to make the judgment absolute (Evans, Ch. Pr. 485); which is granted accordingly.

Q.—Who is liable for the costs incurred by an infant plaintiff?

A.—His *prochein ami* or next friend; but if the infant continues the action after he is twenty-one, he makes himself liable for the whole costs: (Gold. Eq. 387, 4th edit.; Sm. Pr. 80, 5th edit.)

Q.—Can the *prochein ami* of an infant sue *in forma pauperis*, or can any objection be sustained to such *prochein ami* on the ground of his poverty?

A.—An infant's next friend may so sue, and objections to his next friend cannot be made on account of his poverty: (*Davenport v. Davenport*, 1 Sim. & S. 101; Sm. Pr. 870, 7th edit.)

Q.—When the next friend of an infant plaintiff dies, and there is delay in appointing a new next friend, what is the proper course of proceeding by the defendant?

A.—The proper course for the defendant to adopt in such a case is to obtain an order that the court may approve of a new next friend; and four days' notice of the order must be given to the plaintiff's solicitor: (Ayck. Pr. 588, 9th edit.)

Q.—If there be a judgment for the sale of estates to pay debts, and such estates by descent or devise be vested in an infant, how is such sale to be perfected, and under what authority?

A.—By the 1 Will. 4, c. 47, the court is in such case empowered to compel the infant to convey the estates so ordered to be sold for payment of debts to the purchasers thereof in such manner as the court may direct. This power is further extended by the 13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55, enabling the court to make vesting orders, to which statutes the student is referred for further information.

Q.—Can an infant in any case convey land, and if so, in what way?

A.—See preceding answer. Infants, provided they have attained the requisite age, may also, with the sanction of the court, make a valid settlement of their real or personal property: (see p. 349.) And by the custom of gavelkind an infant may make a valid feoffment at fifteen.

Q.—Can an infant be appointed and act as an executor?

A.—He can be appointed, but will not be allowed to exercise his office during minority. In the interval the administration of the goods of the deceased will be granted to the guardian of the infant or to such other person as the Court of Probate may think fit; such person is called an administrator *durante minore ætate*: (Williams P. P. 8th edit., p. 342.)

Q.—Where a tenant for life is an infant, how may the powers of a tenant for life under the Settled Land Act, 1882, be exercised?

A.—By the trustees of the settlement; and, if none, then by such

person and in such manner as the court on application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance orders: (45 & 46 Vict. c. 38, s. 60.)

### LUNATICS.

*Question.*—What is the origin of the Lord Chancellor's jurisdiction in lunacy, and how derived; and to what other judges has it recently been extended?

*Answer.*—The Sovereign, as *parens patriæ*, had from the first the care of idiots and lunatics who had no other guardian. And as the Chancellor is the person by whom the Crown exercises its powers, as keeper of the royal conscience and delegate of the Crown, the authority of the Chancellor is clearly derived from the Crown. By the stat. 14 & 15 Vict. c. 83, this jurisdiction is extended to the Lords Justices of the Court of Appeal. By the 1873 Act, s. 17, the jurisdiction of the Lord Chancellor and the Lords Justices in lunacy matters is not transferred to the High Court of Justice. By the 1875 Act, s. 7, the powers of the Lords Justices may be exercised by any judge of the High Court or Court of Appeal intrusted by the sign manual of the Sovereign with it.

*Q.*—To whom is the term "*non compos mentis*" applicable?

*A.*—Not only to those who are idiots and lunatics, strictly so called, but also to all persons who, from age, infirmity, or otherwise, are incapable of managing their own affairs: (St. Eq. § 731.)

*Q.*—What steps is it necessary to take in order to place a person of unsound mind under the protection of the Lord Chancellor, and to obtain the appointment of a committee of his person and estate?

*A.*—A petition must be prepared and presented to the Lord Chancellor or Lords Justices, stating that the person against whom it is presented is of unsound mind and wholly incompetent to manage his affairs, and conclude by praying for an inquiry before one of the masters in lunacy. The statements in the petition should be supported by affidavit. Notice of the petition is to be served on the alleged lunatic, if within the jurisdiction, and he may demand an inquiry before a jury, which the Lord Chancellor may direct to be before one of the common law divisions: (see 16 & 17 Vict. c. 70, and 25 & 26 Vict. c. 86, ss. 4, 8.) If the person be found lunatic, a committee is appointed to manage his affairs, and he is then under the protection of the Lord Chancellor: (16 & 17 Vict. c. 70.) (a)

*Q.*—How are applications under the Lunacy Regulation Act, 1862, to be made, and what are the formalities to be observed on giving notice to an alleged lunatic of an application for an order in pursuance of that Act?

*A.*—Applications under this Act are made by petition to the Lord

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(a) Where the alleged lunatic does not oppose the application, and his property does not exceed 2000*l.* in value, or 100*l.* per annum, the Lord Chancellor has power to apply it for his benefit in a summary manner without inquisition: (25 & 26 Vict. c. 86, s. 12; 45 & 46 Vict. c. 82; and Lunacy Orders, Feb. 1883.)



Chancellor, signed by the petitioner and attested by a solicitor, in the form given in the schedule to the rules. The notice must be by service on the lunatic personally of a copy of the petition, with a notice thereon indorsed, signed by the petitioner or his solicitor in the Form VIII. in the schedule (Lunacy Orders, 1883).

*Q.*—What circumstances must exist to enable you to apply for a commission to inquire into the alleged lunacy of a man?

*A.*—The alleged lunatic must have property, and there must be *prima facie* evidence of his being unable to protect his own interest. The application is made to the Lord Chancellor or Lords Justices by petition, praying an inquiry as to his insanity, &c., supported by affidavit of the facts.

*Q.*—Can a man under any circumstances be found a lunatic without personal inspection by the jury?

*A.*—Yes; notice of the petition being served upon the alleged lunatic, it is for him to demand a jury, and if he does not, the master in lunacy has jurisdiction without a jury, so the Lord Chancellor may, on personal examination of the alleged lunatic, dispense with a jury. And if there be a jury the presiding judge may dispense with the examination of the alleged lunatic before them: (16 & 17 Vict. c. 70, ss. 41, 42; 25 & 26 Vict. c. 86, ss. 4, 6, 8.)

*Q.*—If parties fail in establishing the lunacy, do the costs of the inquiry in any case fall on the alleged lunatic?

*A.*—Yes; if the Lord Chancellor order this: (25 & 26 Vict. c. 86, s. 11.)

*Q.*—Before whom must proceedings in lunacy, after inquisition found, be commenced, and what is the mode of proceeding? Give the authority for your answer.

*A.*—All proceedings after inquisition found must be commenced before a master in lunacy. The mode of proceeding is by summons: (Lunacy Orders, 1883, r. 23.)

*Q.*—Has the committee of a lunatic power to sell the estate of the lunatic, in any and what cases?

*A.*—He may, by order of the Lord Chancellor, sell or mortgage the lunatic's estate for the purpose of paying debts; discharging incumbrances; providing for the lunatic's maintenance; and paying costs: (16 & 17 Vict. c. 70, s. 116.) And to concur in selling partnership property (sect. 123) and his undivided shares of land, and to apply the moneys to arise (in this case) from such sale for the lunatic's benefit: (sects. 124, 135.) Also, by a like order, the committee may sell the lands in fee for building purposes, and dispose of the lunatic's business premises and leaseholds: (see sects. 125-127; see also 18 Vict. c. 13; 19 & 20 Vict. c. 120, s. 36, and 25 & 26 Vict. c. 86, ss. 12, 13.)

*Q.*—Where a tenant for life is a lunatic, so found by inquisition, how may the powers given to a tenant for life under the Settled Land Act, 1882, be exercised?

*A.*—The committee of his estate may in his name and on his behalf, under an order of the Lord Chancellor or other person intrusted by virtue

of the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under the Act, and the order may be made on the petition of any person interested in the settled land, or of the committee: (45 & 46 Vict. c. 38, s. 62.)

*Q.*—If a defendant on his failing to appear, should be proved to the court to be of unsound mind (not so found by inquisition), what will the court do in such circumstances, and upon whose application?

*A.*—Upon the application of the plaintiff in such a case, the court or judge may order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action. It must be shown that the writ was duly served; also that notice of the application after the expiration of the time allowed for appearance was served upon or left at the dwelling-house of the person under whose care such defendant was at the time of serving the writ at least six clear days before the hearing of the application: (Ord. XIII., r. 1.) (*a*)

*Q.*—How can a plaintiff procure the appointment of a guardian for a person of unsound mind?

*A.*—As already seen, if the lunatic is not so found by inquisition, the court will, on the application of the plaintiff, order a proper person to be guardian. But if he has a committee, the court will appoint the committee to be guardian *ad litem*, unless his interests are adverse to those of the lunatic: (Gold. Eq. 210, 4th edit.; *Charlton v. West*, 4 L. T. Rep. N. S. 455.)

*Q.*—In what cases will the court interfere to carry into effect the contracts of lunatics?

*A.*—Only where there is entire good faith, and the contract is for the benefit of such persons, as to provide them with necessaries, then the court will uphold it: (St. Eq. §§ 227, 228.)

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## RIGHTS OF MARRIED WOMEN.

### 1. Powers of Husband and Wife to contract with each other.

*Question.*—How are contracts treated that are made between husband and wife before and after marriage respectively?

*Answer.*—Contracts made before marriage are generally extinguished by the marriage; unless enforcing them would be furthering the manifest interest of the parties, as in the case of marriage articles. Their contracts after marriage under peculiar circumstances are enforced in equity, as if the wife raises money out of her estate to answer the husband's necessities, she is entitled to be reimbursed out of his estate: (Sm. Man. sect. 822.) By 45 & 46 Vict. c. 75, s. 3, any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business

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(*a*) By Order XVI., r. 17, lunatics in all cases now sue by committee or next friend in the manner formerly practised in the Court of Chancery, and in like manner defend by their committees or guardians appointed for that purpose.

carried on by him, or otherwise shall be treated as assets of her husband's estate in case of his bankruptcy, but the wife may come in after other creditors.

## 2. *Pin Money, Separate Estate, &c.*

**Q.**—If a married woman entitled to pin money permits her husband to receive it, can any, and if any what, arrears be recovered against the husband or his representatives?

**A.**—The wife can only recover one year's arrears against the husband and his representatives, for the money is meant to dress the wife during the year, so as to keep up the dignity of the husband, and not for accumulation: (Sm. Man. sect. 827.) But it seems the better opinion that nothing can be recovered from his estate: (Haynes Eq. 232, 3rd edit., and *ante*, 346.)

**Q.**—If property be given to the separate use of an unmarried woman, with a restraint against anticipation, will the separate use be enforced, on her subsequent marriage, against the husband and his creditors; and what will be the effect of the death of her subsequent husband on her separate use, and what the effect on it in case of her contracting a second marriage?

**A.**—The separate use will be enforced against the husband and his creditors on her subsequent marriage. The woman, while single, and when and as often as she becomes a widow, has the absolute dominion over the property, yet if she does not dispose of the property so as to put an end to the trust, and she marries again, the separate use clause, and the restraint against alienation, will be revived during such and every other subsequent coverture, so long as the property is held upon the original trust: (Sm. Man. sect. 853.)

**Q.**—What power has a married woman of dealing with property settled to her separate use? Is there any, and what, distinction as regards her "pin money," and other property?

**A.**—She may, in equity, dispose of real property settled to her separate use in fee, either by deed or will *without* the concurrence of her husband: (*Taylor v. Meads*, 12 L. T. Rep. N. S. 6, L. C.) The pin money, not being an absolute gift, but only for the purpose of attiring the wife, &c., she cannot dispose of. Personal property settled to the separate use of the wife may, however, be disposed of by her either by deed or will: (see Sm. Man. sects. 849, 850; Hayes and Jarm. Conc. Wills, 169, 6th edit.)

**Q.**—Under a marriage settlement the wife is entitled to the income for her separate use without power of anticipation. In pursuance of an authority given by the wife twenty years ago, the trustees have ever since paid the income to the husband's bankers. What are the wife's rights as to such past income?

**A.**—The authority given by the wife was nugatory, she being restrained from anticipation. But so soon as the income became due all restraint ceased, and the wife, having acquiesced in the payments to the husband's bankers, has no right in respect of such past income: (see *Dixon v. Dixon*, 9 Ch. Div. 587.)

**Q.**—Distinguish between the positions of a married and a single woman in respect of property to which each is entitled under the same will for her separate use, with a restraint upon anticipation.

**A.**—The married woman would be restrained from alienating or disposing of it in any way (except upon application to the court after 31st December, 1881), as the clause against anticipation would prevent her doing so; but the single woman could of course dispose of it as she thinks proper, the separate use clause and the restraint upon anticipation having no effect in her case.

**Q.**—Can a married woman effectually assign or give security upon any property to which she will become entitled on the happening of a future event?

**A.**—She may now do so by deed acknowledged, &c., the husband joining, whether such property be real (see 3 & 4 Will. 4, c. 74; 8 & 9 Vict. c. 106; Brow. R. P. Stats. 125, 276) or personal; provided that, as to the personal estate, it comes to the wife by an instrument executed after 31st December, 1857, and be not settled upon her as a provision for marriage, and there be no restraint: (20 & 21 Vict. c. 57, and see *ante*, p. 237.) No acknowledgment would be required if the property was acquired after 1882 (45 & 46 Vict. c. 75).

**Q.**—Is the separate property of a married woman liable for payment of her simple contract debts, and if so under what circumstances?

**A.**—If the debt was incurred before 1883 it is liable for all the debts (simple contract or specialty) which she expressly charged it with, or with which, judging from the nature thereof, it may be fairly inferred that she intended to charge it. Hence, if she gave a promissory note to pay her own debt, without reference to her separate estate, it is a charge on her separate estate; because otherwise the security can have no operation, for she cannot bind her person: (see Sm. Man. sect. 856; *Johnson v. Gallagher*, 4 L. T. Rep. N. S. 72; but see *Shattock v. Shattock*, 14 L. T. Rep. N. S. 452.)

A woman married after 9th August, 1870, is liable to be sued for her debts contracted before marriage, and any property belonging to her for her separate use is liable to satisfy such debts as if she had continued unmarried (33 & 34 Vict. c. 93, s. 12); and now, by 45 & 46 Vict. c. 75, a married woman may contract as if she were a *feme sole*, and such contract will be deemed to be entered into with respect to her separate property unless the contrary be shown.

**Q.**—A married lady becomes during the coverture absolutely entitled to money, and claims to have it settled on herself. At the time of her marriage she was indebted to various creditors, who now claim payment of her debts out of her separate estate before any settlement be made of it. Has the lady or have the creditors the preferent equity?

**A.**—The creditors have the preferent equity. See preceding answer.

**Q.**—Can a married woman bind herself by contract in any, and what, case?

**A.**—She cannot (except in those cases where she might sue alone) bind her person; but, as stated above, she may bind her separate estate: (St. Eq. §§ 139 and note, and 1400 and note; Sm. Man. sect. 856; *Johnson v.*

*Gallagher*, 4 L. T. Rep. N. S. 72; *Hulme v. Tenant*, 1 L. C. Eq. 394, 2nd edit.)

Q.—How may questions between husband and wife as to the separate property of the wife be decided, and is there any summary jurisdiction, and, if so, how and by whom can it be exercised, and is the jurisdiction affected by the value of the property?

A.—It is provided by sect. 17 of 45 & 46 Vict. c. 75, that, in any question between husband and wife as to the title to or possession of property, either party may apply by summons or otherwise, in a summary way, to any judge of the High Court of Justice, or in England (irrespective of the value of the property), to the judge of the County Court of the district in which either party resides, and the judge may make such order, direct such inquiry, and award such costs, as he shall think fit. The order is subject to appeal in the same manner as an order in a pending action or equitable plaint.

Q.—Can a married woman alienate a *chose in action* vested in her, and how, and with any and what exceptions?

A.—As a rule, she cannot assign her *chose in action*, the act of marriage depriving her of this power. But, if settled to her separate use, or belonging to her under the Married Women's Property Acts, 1870 and 1882, she may do so: (Will. P. P. 425, 431, 10th ed.) So, when she has been judicially separated; or, it seems, obtained a protecting order under the Divorce Act: (20 & 21 Vict. c. 85, ss. 21, 25, 26; 21 & 22 Vict. c. 108, ss. 8, 10; *Heath v. Lewis, Ex parte Johnson*, 11 L. T. Rep. N. S. 333.) As to the power of the wife over her reversionary *choses in action*, see *ante*.

Q.—Will an agreement by a *feme coverte* for the sale of her estate (not belonging to her for her separate use), with or without the concurrence of her husband, be binding on her?

A.—It will not in either case. To bind herself in respect of such property she must execute and acknowledge a deed in the manner pointed out by the 3 & 4 Will. 4, c. 74.

Q.—What is necessary to give validity to the will of a married woman?

A.—The licence or assent of her husband is necessary to dispose of her personal estate (see *ante*, p. 238) not settled to her separate use, or not being her separate property under the 33 & 34 Vict. c. 93, or 45 & 46 Vict. c. 75; but property settled to her separate use, or over which she has a power of appointment by will, or takes as executrix, she can dispose of by will like any other person.

Q.—What is the meaning of a wife's equity to a settlement, and how enforced?

A.—It is a right which a wife has to have a settlement made upon her out of real or absolute personal estate (save a legal term for years) belonging to her, which the husband could not formerly obtain possession of without the aid of a court of equity. And, whenever the wife, as defendant, would be entitled to this equity, she may enforce it as plaintiff by writ: (Sm. Man. sect. 871; *Lady Elibank v. Montolieu*, 1 L. C. Eq. 341, 2nd edit.)

Q.—A lady who married without a settlement, and has been deserted by her husband, becomes entitled to 3000*l.* Consols, standing in the names of trustees. Her husband claims the fund, and threatens the trustees with legal proceedings. The trustees desire to help the wife. How would you advise—(1.) The trustees. (2.) The wife?

A.—I should advise the trustees to pay the money into court, under 10 & 11 Vict. c. 96, and, in the event of their adopting this course, should advise the wife to present a petition to enforce her equity to a settlement, but, in case the trustees should not pay the money in, I should advise the wife to issue a writ in the Chancery Division to have the trusts administered, and her equity enforced. If the property accrues after 1882 the trustees would be safe in paying to the wife on her separate receipt: (45 & 46 Vict. c. 75.)

Q.—To what extent is this equity enforced by the court against the husband and those claiming under him?

A.—It is enforced not only against the husband, but out of the wife's immediate *choses in action* and immediate absolute equitable interest in chattels personal, also against his trustees in bankruptcy, and his assignees for payment of debts generally, and even against his specific assignees for value. (a)

However, as against the latter, as against the husband, it is only necessary that the provision for the wife should commence from the death of the husband; while, as against the two former, it is necessary that the provision should commence immediately, because the husband is, in these cases, rendered incapable for a time, and perhaps for ever, of affording her a suitable support: (Sm. Man. sect. 871, *et seq.*) As to the amount settled, see *post*.

Q.—Distinguish between a wife's equity to a settlement and the separate estate of a married woman. Can a married woman now acquire separate property in any, and what, cases otherwise than by settlement or contract?

A.—A wife's equity to a settlement is defined *sup.* The distinction between that and her separate estate is that she is absolutely entitled to the latter, and that it is altogether beyond the husband's control. A wife could acquire separate property under the 33 & 34 Vict. c. 93; and now, under 45 & 46 Vict. c. 75, she will be in the same position as a *feme sole*:

Q.—Will the court require any settlement in favour of a wife out of property coming or bequeathed to her, and claimed by her husband; and if so, in what proportion to the amount of the legacy?

A.—In such case the court will compel the husband to make a settlement upon the wife, and the proportion so settled is usually half of the property: (Sm. Man. sect. 833; 1 Bright's H. & W. 241.)

Q.—Where a legacy is given to a married woman, in what way may her husband recover it?

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(a) In cases within the Married Women's Property Acts, there will be no question as to the wife's equity, as the property belongs to her solely. The importance of the learning as to this branch of law is therefore much diminished.



A.—If the legacy (accrued before 1883) is specific, and the executor has assented thereto, the husband may recover it in all the divisions of the court. If not specific, it must be sued for in the Chancery Division (St. Eq. §§ 591, 592, 595, 598), when the court will not give it to the husband unless he makes a settlement thereout on the wife: (Sm. Man. sect. 871.) But by the 33 & 34 Vict. c. 93, s. 7, where any woman married after the passing of the Act (9th August, 1870) becomes entitled to any property as next of kin of an intestate, or to any sum not exceeding 200*l.* under any deed or will, subject to any settlement, it belongs to her for her separate use, and in all cases since 1882 she will be entitled to the whole independently of any husband.

Q.—Suppose the husband to be bankrupt, and the wife wishes to have the fund appropriated to her own benefit as far as may be, to what extent will the court give effect to her wish?

A.—The court will order the income of three-fourths, or three-fifths, or perhaps the whole fund, to be applied primarily to the maintenance of the wife during her life, and after her death the principal to be divided among the children; because the husband, in this event, must remain for a time, and perhaps for ever, without funds to maintain his wife; (Sm. Man. sect. 883; *Spirett v. Willows*, 14 L. T. Rep. N. S. 720.)

Q.—State some of the instances in which a wife's equity to a settlement may be lost or forfeited by her.

A.—It may be lost or suspended by her own misconduct. Thus, if the wife (not being a ward of court married without its consent) should be living in adultery apart from her husband, the court will not direct a settlement on her own application; nor will the court give the fund to the husband: (St. Eq. §§ 1419 and note, 1419 a; Sm. Man. sect. 886.)

Q.—Are there any circumstances under which the rule which requires a settlement on the wife will be relaxed in favour of the husband? If so, state how and in what instances.

A.—Where the wife and children are already amply provided for by a prior settlement, no further settlement will be required. And the wife may (not being a ward of court who has married without its consent) waive her right in open court, or under a commission: (Sm. Man. sect. 885.) An exception also occurs where the amount is under 200*l.*, as stated *infra*.

Q.—What amount of principal money, or of an annual payment, will the court pay to a married woman or her husband without order; and what evidence is required in support of the application?

A.—Any amount which does not exceed 200*l.* in principal, or 10*l.* annually (C. O. 1, r. 1; Dar. Trusts. 76); but if the wife chooses, she may appear and insist upon her right to a settlement: (see *Re Cutler*, 14 Beav. 220; *Re Kincaid's Trusts*, 22 L. J. 395, Oh.)

If the wife does not insist upon her equity, then upon producing a certificate of the marriage, verified by affidavit, a certificate of the fund in court, and a joint affidavit of husband and wife that there is no settlement or agreement for a settlement whatever, the Paymaster-General will

draw the cheque 'in favour of the husband : (see O. O. 1, r. 1 ; Ayck. Pr. 471-473, 9th edit. ; Dan. Ch. Pr. 6th edit. 127.) (a)

Q.—A power of jointuring an intended wife, exercisable only by an appointor from time to time in receipt of the rents of a settled estate, is exercised by one entitled to receive the rents, but not actually in receipt of them. Will the court in any and what circumstance uphold the jointure against the estate ?

A.—The court will make good the appointment if the party afterwards actually come into possession : (2 Sug. Pow. 119, 7th edit.)

### 3. *Miscellaneous Points.*

Q.—How must a married woman in respect of her separate estate, or otherwise, sue ? and who is responsible for the costs of the suit ?

A.—She may now sue in her own name in all respects as if she were a *feme sole*, and her separate estate will be liable for costs : (45 & 46 Vict. c. 75.)

Q.—How does a married woman defend an action, and if she is an infant does that make any, and what difference ?

A.—A married woman now defends as if she were a *feme sole* ; but if an infant a guardian must be appointed : (Ord. XVI, r. 16.)

Q.—When do the *choses in action* of the wife who survives her husband pass to the husband's executors ?

A.—When he has reduced them in possession in his lifetime : (Alln. Wills. and Adms. 284, 3rd edit.)

Q.—A married woman, entitled to a reversionary *chose in action* not affected by any settlement, dies, leaving her husband and infant children surviving. How and by whom can a valid receipt be given for the money when it becomes payable ?

A.—The husband on taking out letters of administration can give a valid receipt.

Q.—A *feme sole* entitled to freeholds in fee simple, to chattels real and chattels personal, some in possession, some in reversion, marries without a settlement ; which of these various kinds of property can her husband dispose of by act *inter vivos* without her concurrence, and which with, putting out of the question the wife's equity to a settlement ?

A.—Unless married since 1882, in which case all her property remains separate estate, the husband may, without his wife's concurrence, dispose of her chattels real, whether in possession or reversion (St. Eq. §§ 1410, 1413) ; and chattels personal in possession, for they were his by the marriage. The wife's freeholds in fee, and some of the reversionary interests in personal property may be jointly conveyed or assigned by her and her husband by deed acknowledged : (see 3 & 4 Will. 4, c. 74 ; 8 & 9 Vict. c. 106 ; 20 & 21 Vict. c. 57.)

Q.—At the time of marriage a wife is entitled to a beneficial lease for years and she outlives her husband. Can the husband sell the lease during

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(a) If the money exceeds the above amounts, the husband and wife present a joint petition, and the court orders a settlement : (Ayck. p. 471, 9th edit.)

the coverture without her consent; and if it is not sold, to whom will it belong on the death of the wife?

A.—Unless married since 1882, the husband may, during the coverture, charge or dispose of the lease as he thinks fit, but he cannot devise it by will during the coverture. On the death of the wife, surviving her husband, it will belong to her personal representative: (see *Matt. Exors.* 40, 41, 2nd edit.)

Q.—Is the wife a necessary party to an action for recovery of property accruing to her after marriage, and was there any difference in the rules of law and equity in this respect?

A.—She is now the only proper party; formerly the husband might when legally entitled, as a general rule, sue alone for any property coming to the wife during marriage, except, of course, as regards her separate property: (see *Arch. New C. L. Pract.* 24, 25, 2nd edit.) But where only equitably entitled, it was necessary in all cases where the property sought to be recovered was the property of the wife, that she should be a party with the husband, whether the right thereto accrued before or after marriage: (see *Dan. Ch. Pr.* 119, 120; *Clark v. Angier*, 2 *Freem.* 160.)

Q.—Husband and wife agree to separate and execute a deed of separation between them; afterwards they become reconciled, but subsequently again separate. What effect has the deed of separation (1) on the reconciliation, (2) on the subsequent separation?

A.—Subsequent cohabitation (which here seems to be meant) would avoid the deed, unless it contained a stipulation to the contrary, or the husband promised to continue the payment upon the wife's going back to him at his request, and the deed would not revive on any future separation. But when the separation deed amounted to a settlement it would remain valid, notwithstanding the reconciliation: (Lord St. Leonard's *Handy Book*, 8th edit., 162; *Ruffles v. Alston*, 19 *Eq.* 539.)

Q.—If access to her infant children be refused to a mother by the father or guardian, will the court interfere to any, and what, extent; and, if so, under what authority?

A.—The court is empowered by the 36 *Vict. c. 12*, upon the petition of the mother, to make an order for the access of the petitioner to such infant or infants, at such times, and in such manner, as the court shall think fit; and if such infant, or infants, be within the age of sixteen years, may order them to be delivered up to, and remain in, the custody of the mother until such age, and subject to such regulations as may seem just. (a)

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### ALIENS.

*Question.*—May an alien sue for any, and what, demands in the courts of this country?

*Answer.*—Formerly an alien could only sue for personal demands in the courts of this country: (*Co. Lit.* 129 a; 2 *St. C.* 410, 8th edit.) But as

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(a) The petition should be presented in the Chancery Division.

aliens can now, by the Naturalisation Act, 1870 (33 Vict. c. 14), acquire both real and personal property, their right to sue is also extended to real property.

*Q.*—Is the right dependent on any, and what, circumstances?

*A.*—Yes; for, if he is the subject of one that is an enemy to the Queen (or King), he cannot maintain an action in the courts of this country until peace between the two nations is declared, even for personal demands: (Co. Lit. 129 a; 2 St. C. 410, 8th edit.)

*Q.*—Under what circumstances is an alien born capable of being a trustee of real estate? Give the authority for your answer.

*A.*—By the 33 Vict. c. 14, s. 2, an alien may now take, acquire, and hold property in the same manner as a natural born British subject, and may accordingly be a trustee thereof: (Smith's Prin. of Equity, 25.)

*Q.*—Can an alien enforce a trust in his favour relating to real estates or chattels real in England, or to personal estate?

*A.*—It seems that prior to the 33 Vict. c. 14, an alien could not enforce a trust in his favour, relating to real estate in England: (see Sug. Con- V. 540, 541; but see Burt. Comp. pl. 193, n.) But by the above Act real and personal property of every description (except British ships, sects. 14) may now be taken, acquired, held, and disposed of by an alien in the same manner in all respect as by a natural-born British subject.

*Q.*—Can a foreigner resident abroad issue a writ for relief in the court here; if so, what protection has the defendant in such a case against the plaintiff for costs?

*A.*—If the foreigner is the subject of a friendly nation, he may issue a writ in the court here (Co. Lit. 129 a; St. C. *ubi sup.*); but, as he resides out of the jurisdiction of the court, the defendant will be entitled to an order for security for costs, and, in the meantime, all proceedings will be stayed: (Evans, Ch. Pr. 204.)

*Q.*—Can a foreign sovereign sue in respect of a supposed injury to property belonging to him or his subjects in his dominions, and intended to be committed out of the jurisdiction, and give your authority?

*A.*—A foreign sovereign with whom the Crown of England is at peace, is, by force of the law of nations, which is part of the law of England, entitled to the protection of the court to restrain threatened acts which would be injurious to the *property* of such sovereign or his subjects; but not to restrain acts which might be injurious to the *prerogative* of such sovereign: (*The Emperor of Austria v. Day*, 4 L. T. Rep. N. S. 274, 294.)

*Q.*—Under what circumstances can a foreign state maintain an action in an English court, and by whom should the action be instituted?

*A.*—A foreign state, if recognised by this Government, is entitled to the aid of this court, but it must give security for costs, and sue in the name of some public officers who are entitled to represent the interest of the state, and upon whom process can be served on the part of the defendants: (*The Columbian Government v. Rothschild*, 1 Sim.

104.) And it must conform to the practice and regulations of the court: (*Prioleau v. The United States, &c.*, 14 L. T. Rep. N. S. 700; s. c. L. Rep. 2 Eq. 659.)

### DISCOVERY. (a)

*Question.*—What was a bill of discovery?

*Answer.*—Every bill requiring an answer was in a certain sense a bill of discovery; but the species of bill usually so distinguished by this title was a bill for discovery of facts resting in the knowledge of the defendant, or of deeds, or writings, or other things in his custody or power, and seeking no relief in consequence of the discovery; an action for discovery will still lie except where a simpler remedy is expressly given under the Judicature Acts.

*Q.*—In what cases was it formerly necessary to resort to a court of equity in support of a right which could be established only through a court of law?

*A.*—If any discovery were necessary before the right could be established at law, the party seeking it would formerly have been compelled to have had recourse to a court of equity, till the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), gave the courts of common law a power of compelling discovery on the application of either party, either of documents in their possession or power relating to the matter in dispute, or of facts in their knowledge, leave being first obtained: (ss. 50, 51.) (b)

*Q.*—A. brings an action against B., in which C. is a material witness for the former, but without having any interest whatever in the matters in question between these two parties. Can or cannot B., who is ignorant of what C. will depose to against him, compel C. to disclose his evidence? And give the reason for your answer.

*A.*—No; for as C. may be examined as a witness in the action, there is no ground to make him a party to an action, unless he is charged with fraud; as in the case of a solicitor who has assisted a client in obtaining a fraudulent deed: (see St. Eq. §§ 1489, 1495, 1499, 1500.)

*Q.*—Give some instances in which a defendant may object to give discovery sought by the interrogatories.

*A.*—(1.) On the ground that the discovery would subject the party giving it to a penalty or forfeiture. (2.) That the defendant's right is equal to the plaintiff's. (3.) That the discovery sought is immaterial to the relief claimed, or not sufficiently material at that stage. (4.) On the grounds of professional confidence. (5.) That the discovery sought relates exclusively to the respondent's case. (6.) That a third party has an interest in the discovery, and ought not to be prejudiced. (7.) That the discovery might be injurious to public interests: (Dan. Ch. Pr. 6th edit. 1582, *et seq.*)

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(a) See Order XXXI., and *ante*, p. 115.

(b) By the 1873 Act, s. 24, sub-s. 1, the Court, and every judge thereof, is now to give the plaintiff or petitioner the same relief as the Court of Chancery formerly gave.

**Q.**—How is discovery obtainable in an action against a joint stock company?

**A.**—By Order XXXI., r. 5, the plaintiff may apply at chambers for an order allowing him to deliver interrogatories to any member or officer of such company, and an order may be made accordingly; and any such order for discovery of documents should state by what officer it is to be made.

**Q.**—When an order has been made for a defendant to make an affidavit as to documents, upon whom should such order be served, and how may it be enforced?

**A.**—By Order XXXI. service of an order for discovery or inspection made against any party or his solicitor is sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the attachment is made may show in answer to the application that he has had no notice or knowledge of the order (r. 22); but a solicitor upon whom an order against any party for discovery or inspection is served under the last rule, who neglects without reasonable excuse to give notice thereof to his client is liable to attachment (*Ib.*, r. 23), and if any party fails to comply with any such order he is liable to attachment, and also, if a plaintiff, is liable to have his action dismissed for want of prosecution, and if a defendant to have his defence, if any, struck out and to be placed in the same position as if he had not defended: (*Ib.*, r. 21.)

**Q.**—Sketch the common form of affidavit of documents under an order for discovery.

**A.**—This is prescribed by Ord. XXXI. rr. 13 and 17, and will be found in form 8 of Appendix B. to the Rules.

The party should state that all the documents in his possession or power are set out in the first and second parts of the first schedule thereto.

That he objects to produce the documents mentioned in the second part.

Should then set out the grounds of objection.

That in the second schedule thereto he has set out a list of documents which have been but are not then in his possession or power.

He should state when they were last in his possession or power, and what has become of them since, and in whose possession they now are.

And should finally negative ever having had any others in his possession or power.

**Q.**—What was the distinction between a bill for discovery and relief, and a bill for discovery only; and in what respect did the proceedings on the two bills differ?

**A.**—A bill for discovery and relief went on to a hearing, whilst a bill for discovery only stopped when the discovery was obtained, and never went to a hearing: (Ayck. Pr. 274, 9th edit.)

**Q.**—In order to sustain a bill of discovery, what must clearly have appeared on the face thereof?



A.—(1) The matter touching which the discovery was sought, (2) the interest of the plaintiff and defendant in the subject, and (3) the right of the first to require the discovery from the other: (Evans, Ch. Pr. 273.) (a)

Q.—In the case of a bill being filed merely for discovery, what was the rule respecting the payment of costs of the proceedings?

A.—As soon as the defendant had filed his answer, and the time allowed for excepting had expired, he might move for an order as of course for his costs of suit: (Ayck. *ubi sup.*)

Q.—Could the defendant move to dismiss a bill filed for discovery only and not for relief?

A.—When the bill did not pray relief, the defendant could not move to dismiss the suit: (*Woodcock v. King*, 1 Atk. 80; Ayck. Pr. 274, 9th edit.; Hal. Suit. 80.)

### PERPETUATING TESTIMONY.

Question.—What is the nature and effect of proceedings to perpetuate the testimony of witnesses?

Answer.—The writ does not pray relief against the defendant. When the testimony of witnesses is in danger of being lost before the matter to which it relates can be made the subject of judicial investigation, the court will lend its aid to preserve and perpetuate the testimony: (Evans, Ch. Pr. 334.)

Q.—If an estate be devised by will away from the heir-at-law, and the devisee is desirous to secure the testimony of the witnesses to the will, what proceedings can the devisee take to accomplish this object?

A.—The devisee may issue a writ to perpetuate testimony against the heir, setting forth the will *verbatim*, and suggesting that the heir is inclined to dispute its validity; and then, when the action is at issue, the witnesses to the will are examined, after which the action is at end; but the heir is entitled to his costs, even though he contests the will.

Q.—What statute was there upon this subject, and what provisions are now substituted?

A.—The 5 & 6 Vict. c. 69, s. 1, enacted that any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or estate, the right to which could not by him be brought to trial before the happening of such event, might issue a writ to perpetuate any testimony which might be material for establishing such right. This Act is now repealed, but the provisions are repeated by Ord. XXXVII, r. 25. (b)

Q.—Did the Court of Chancery lose any of its jurisdiction by the passing of the Probate Act? and if so, what part?

(a) If the plaintiff's claim be for discovery only, the statement of claim must now show it: (Ord. XXI, r. 6.)

(b) A writ should be issued now in the Chancery Division.

A.—By this Act (20 & 21 Vict. c. 77), where a will has been proved in solemn form in, or its validity decided by, the Probate Court, this binds persons interested in the real estate comprised in the will: (see sects. 61, 62.) And where this had been done, it was of course, unnecessary to go into equity to establish the will. But the Act did not by express enactment oust the jurisdiction of equity; and on behalf of a devisee equity has still a jurisdiction in these cases: (*Jones v. Gregory*, 9 L. T. Rep. N. S. 556; *Williams v. Williams*, *ib.* 566.)

Q.—By marriage settlement estates are limited to A. for life, remainder to the eldest and other sons of the marriage successively in tail. The eldest son has attained twenty-one; the father and son concur in barring the entail, and they borrow money on security of the estates. On the investigation of the title for that purpose, the certificate of the baptism or birth of the eldest son cannot be found, but an aged relative of the family present at the birth of the son can prove his birth and legitimacy; what proceedings should be adopted to make this evidence available in the event of litigation after the death of the witness? And state the general course of such proceedings.

A.—Under the circumstances detailed in this question, a writ should be issued for the purpose of perpetuating the testimony of the relative who can prove the birth and legitimacy of the son. The action is proceeded with in the usual way, and as soon as the issue is joined an order for the appointment of an examiner may be obtained, and the examination of the witness taken. After the examination there is an end of the action, for, as the claim does not pray relief, the action is never brought to a hearing. As soon as the examination is complete, the defendant is entitled to apply for his costs, upon the simple allegation that he did not examine any witnesses: (*Evans*, Ch. Pr. 334.)

Q.—In what cases cannot the evidence taken under a writ to perpetuate testimony afterwards be used?

A.—Such evidence cannot be used if the witnesses are alive, and capable of attending, and within the jurisdiction at the time of the trial: (see St. Eq. § 1507 *et seq.*; *Evans*, Ch. Pr. 335.)

## SOLICITOR AND CLIENT.

*Question.*—Explain and illustrate the general principles on which the Court of Chancery acts in adjudicating on dealings and transactions between a solicitor and his client.

*Answer.*—Between solicitor and client entire good faith is required; and during the existence of that relationship between them there is a general inability to deal with each other. If a solicitor contracts with or takes a bond from a person who at the time is his client, he is subject to the *onus* of proving the perfect fairness of the transaction. And a gift made to a solicitor *pendente lite* will be set aside: (St. Eq. §§ 310-313, 317, 319; *Harrison v. Guest*, 27 L. T. Rep. N. S. 208.)

Q.—A client desires to tax his solicitor's bill of costs. What steps must he take, and what is the rule as to the costs of taxation?

A.—The client may present a petition of course for taxation of his solicitor's bill; but if a year has elapsed, or the bill has been paid, a special application should be made by summons. If more than one-sixth of the bill is taxed off, the solicitor must pay the costs of taxation; if less than one-sixth, the client has to pay the charges.

Q.—A., the solicitor for B., the plaintiff in an action to recover a bond debt due from C., purchases the debt from B. *pendente lite*. He afterwards assigns it for value, without notice of the circumstances, to D., who gives notice to C. of his assignment. Advise on D.'s title to the debt.

A.—Under the 25th section of the Judicature Act, 1873, sub-sect. 6, D. can only take subject to the equities affecting the debt; it would be still open to B. to set aside the transaction.

Q.—If one of a firm of solicitors be appointed and acts as trustee, is he or his firm entitled to professional charges? Refer to any recent decisions on the subject.

A.—The rule that a trustee, being also a solicitor, will not be allowed his professional charges, unless authorised by the trust instrument, has been modified by recent cases. In *Cradock v. Piper*, it was held that one of several trustees, being a solicitor, may be employed by his co-trustees, and make the usual charges against them, provided the amount of the cost be not thereby increased: (1 M. & G. 664; 15 L. T. Rep. N. S. 61.)

And in the case of *Clark v. Carlon*, it was decided by Wood, V.C., that where one of a firm of solicitors is a trustee, and he and his partner agree that the partner shall do all the work and have all the profits of the trust business, the partner may make and recover against the trust-estate the usual professional charges: (4 L. T. Rep. N. S. 361.)

Q.—Define the nature and extent of a solicitor's lien on papers in his hands belonging to his client, and also of his lien on a fund recovered in an action.

A.—The former is merely a right to withhold the deeds, &c., until his costs are paid; it is only a passive lien. It prevails as against the representatives of the client, but is only commensurate with the right of the client; so that when a mortgage is paid off, the solicitor of the mortgagee cannot retain the deeds. But a solicitor has a lien on a fund realised in an action for his costs of the action, or immediately connected with it; and this is a lien which he may actively enforce: (see Sm. Man. sect. 616.)

Q.—What are the rights of a solicitor who has a lien on a client's deeds and papers, with reference to the production as well as delivery of them up to his client?

A.—He cannot be compelled to deliver up or produce the documents to the client until his costs are paid. But the lien will not prevent the production of them in case of legal proceedings between third parties. Nor will the lien be allowed to prejudice the rights of persons claiming adversely and paramount to the client.

Q.—Have the town agents of a country solicitor any, and what, lien upon the papers in their hands belonging to the clients of the country solicitor?

A.—The town agent of the solicitor in the country has no lien for his *general* balance upon papers of the client which come into his hands; but he has a particular lien to the extent of his charges in the action or matter in which he has been the agent for the country client.

Q.—Is notice to the London agent of a solicitor of an infant purchaser binding on the purchaser, if the purchase is made under a judgment of the court?

A.—Notice to the London agent is sufficient, assuming that he has represented the purchaser in the proceedings.

Q.—Can the court give solicitors a charge for their costs upon the property recovered or preserved by them?

A.—Yes, unless the right to recover the costs is statute-barred; and all conveyances to defeat such charges are void, except as against a *bond fide* purchaser for value without notice: (23 & 24 Vict. c. 127, s. 28.)

Q.—Can a solicitor, on taxation, get interest allowed on his cash disbursements, if he be fairly entitled thereto? and if so, under what Act?

A.—Yes. By sect. 17 of the 33 & 34 Vict. c. 28, the taxing master may allow interest at such a rate and from such time as he thinks just, on moneys disbursed by the solicitor for the client.

Q.—What authority ought to be taken by a solicitor from his client for the prosecution or defence of an action?

A.—The solicitor should be careful to obtain a written authority or retainer from his client to institute or defend the action. But although such authority may be by *parol*, yet if so, and the authority is afterwards disputed by the client, the *onus probandi* will lie on the solicitor: (Gold. Eq. 206, 4th edit.)

Q.—Can the solicitor be made a party to an action for the purpose of compelling a discovery from him?

A.—If a writ for discovery be issued against a solicitor, he cannot be compelled to disclose the secrets of his clients; unless he is charged with fraud, as if he had assisted a client in obtaining a fraudulent deed: (St. Eq. §§ 1496, 1500.)

Q.—What is the rule with respect to the notice to the counsel, solicitor, or agent being notice to the client or principal?

A.—That it is good notice, since in each case it would be a breach of trust or confidence in the agent, solicitor, or counsel not to inform the principal or client. The notice to the counsel, solicitor, or agent must, however, be in the same transaction or in one closely followed by and connected with another: (see St. Eq. § 399; *Le Neve v. Le Neve*, 2 L. C. Eq. 23, 2nd edit.; and 45 & 46 Vict. c. 39, s. 3.)

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## THE COURTS, JUDGES, AND OFFICERS THEREOF. (a)

Question.—Name the several courts formerly having equitable juris-

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(a) As to the Supreme Court of Judicature, which includes the Court of Appeal and the High Court of Justice and its jurisdiction, see *ante*, p. 56, Common Law Division.

diction, distinguishing those in which the jurisdiction was limited, and to what extent.

*Answer.*—The principal court of equity in England was the High Court of Chancery, of which the Lord Chancellor was the head; the different branches of the court were the Court of Appeal, the Court of the Master of the Rolls, and the Vice-Chancellors' Courts. There were also courts of equity in the Counties Palatine, in the two Universities, in the City of London, and in the Cinque Ports, but their jurisdiction was limited: (3 St. C. 350 n, 8th edit.) The Common Law Procedure Act, 1854, (17 & 18 Vict. c. 125), also invested the common law courts with an equitable jurisdiction; and the County Courts had a jurisdiction up to 500*l.* in certain cases.

*Q.*—How far did the jurisdiction of the Court of Chancery extend? Could it make a decree relating to land out of the jurisdiction? State the rule.

*A.*—The jurisdiction of the court, so far as enforcing its orders by attachment, &c., or binding land by its decrees, extended only to England and Wales. But it might order service of proceedings abroad, even though the subject-matter of the suit was also out of the jurisdiction: (*Drummond v. Drummond*, L. Rep. 1 Eq. 355; s. c. on app. 15 L. T. Rep. N. S. 337.)

It followed that the court could not decree a partition of lands abroad; but it might enforce specific performance respecting such lands if the defendant was here, or came within the jurisdiction of the court. For the general rule was that although the property in controversy were out of, yet if the parties were, or came within, the jurisdiction, the court would, so far as it could, give relief by proceeding against the parties, and not directly against the property: (*Ib.*; *Penn v. Lord Baltimore*, 2 L. C. Eq. 762, 2nd edit.)

*Q.*—Enumerate the former equity judges in their order and rank, and describe the constitution of the courts of appeal, including the highest in the realm, and the mode of giving judgment in each.

*A.*—The order in which the equity judges ranked were: 1. The Lord High Chancellor. 2. The Master of the Rolls. 3. The Lords Justices. 4. The Three Vice-Chancellors.

The Court of Appeal was constituted by the statute 14 & 15 Vict. c. 83, by which Act two Lords Justices sitting alone or with the Lord Chancellor, or one of the Lords Justices sitting alone with the Lord Chancellor, might hear appeals, and exercise the same jurisdiction, powers, and authorities as were exercised by the Lord Chancellor. By the 30 & 31 Vict. c. 64, s. 1, all the jurisdiction, powers, and authorities of the Court of Appeal might be exercised by either of the Lords Justices when sitting separately, but no decree made on the hearing of a cause, or on further consideration, could be reheard before such judges when sitting separately. As to present Court of Appeal see *ante*, p. 56.

The House of Lords was the highest court of appeal in the realm, and was composed of the peers of the realm, but the judgments were in general only considered by the law lords. It was constituted by the common law. The present court is constituted by 39 & 40 Vict. c. 59.

The judgments of each court were delivered by the respective judges

thereof in public. The Lord Chancellor was empowered by 15 & 16 Vict. c. 80, s. 60, to deliver a written judgment within six weeks after he had retired from office. The judgments of the House of Lords were delivered by the law lords, which were adopted by the House.

**Q.**—What were the duties of the Accountant-General? Was it his duty to manage the investment of the funds under the control of the court? And was he a judicial officer in any respect?

**A.**—The duties of the Accountant-General (now the Paymaster-General) were to perform all matters relating to the delivery of the suitors' money and effects into and taking them out of the Bank of England. But he did not actually receive the money, &c.; it was merely placed in the bank in his name, and he kept an account with the bank, and gave the bank power to receive the dividends thereof as they became due. He could not invest the funds, unless paid in under statutory provision, without order of the court. He could not be said to be a judicial officer, unless, indeed, he were so under C. O. 1, rr. 1-8: (see Ayck. Pr. 444, 474, &c., 9th edit. and next answer.)

**Q.**—State shortly the effect of the Court of Chancery Funds Act, 1872.

**A.**—The principal effect of the Act (35 & 36 Vict. c. 44) was to abolish the office of the "Accountant-General" of the Court of Chancery and to transfer his duties to the "Paymaster-General." Sect. 14 provides that money paid into court shall, subject to the provisions of the Act and of any rule made thereto, be placed on deposit account and bear interest at 2l. per cent. The orders made pursuant to the Act are now consolidated and amended by the Supreme Courts Funds Rules, 1884.

**Q.**—What are the duties of the examiners?

**A.**—They are to preside at the oral examination of witnesses; to administer oaths and take affirmations; to take down the examination in writing in the form of a narrative, read it over to the witness, and request him to sign it; and then transmit it to the central office: (Evans, Ch. Pr. 313, &c.; Hal. Suit, 54.)

**Q.**—State the duties of the clerks of records and writs.

**A.**—Their duties are to issue and seal writs, enter appearances, and file affidavits, &c.

**Q.**—State the duties of the registrars.

**A.**—They are principally to set down actions, and make out a list thereof, to take down minutes of the judgments, to draw up same and orders, and settle and sign them.

**Q.**—What are the functions of the conveyancing counsel of the court?

**A.**—Their duties are to peruse abstracts, prepare conditions of sale, requisitions on title, and such conveyances as may be necessary on sales or investments carried out under direction of the court; also to prepare settlements under the Infants' Settlements Act, &c.: (see 15 & 16 Vict. c. 80, s. 40.)

**Q.**—What is the distinction between the judicial and the administrative jurisdiction of the Chancery Division of the High Court. Name the officers who preside over each branch?



*A.*—The judicial jurisdiction of the court consists in the decision or determination of the matter which is really at issue between the litigants. The administrative jurisdiction consists in the regulation of the proceedings used by the court to assist it in its judicial capacity, and to enforce its orders and judgments.

The judicial officers of the Chancery division of the High Court are the Lord Chancellor (the President), the Vice-Chancellor Bacon, and the four justices, Kay, Chitty, Pearson, and North. The administrative officers are the registrars, the taxing masters, the Paymaster-General, the chief clerks, and the record and writ clerks; but some of the duties of these are also partly judicial, as matters that come before the judges' chief clerks.

*Q.*—How and when did the House of Lords gain the power of sitting as the highest court of appeal?

*A.*—The House of Lords succeeded to this authority, as of course, upon the dissolution of the *Aula Regia*. For, as the barons of Parliament were constituent members of that court, and the rest of its jurisdiction was dealt out to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside, it followed that the right of receiving appeals, and superintending all other jurisdictions, still remained in the residue of that noble assembly, from which every other great court was derived: (see St. C. 361, 8th edit.) (*a*)

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### PARTIES TO SUITS.

*Question.*—State the different disabilities by which a person may be hindered from suing, and the distinguishing characters of these disabilities.

*Answer.*—The usual disabilities are infancy, coverture, idiotcy, and lunacy. For, as to infants and lunatics and idiots, they are generally treated as having no capacity to bind themselves, from the want of sufficient reason and discernment of understanding; but married women may now sue as *femes soles*. These disabilities are, however, more as a protection than otherwise. On the other hand, as a suit cannot be instituted against them, it would be unjust to allow them to institute suits against others, when they are not liable for their own acts, for the remedy ought to be mutual. So an alien enemy cannot sue, nor an outlaw, nor a convict, nor a bankrupt, for that would be contrary to public policy. So, if both parties are *in pari delicto*, the court will not interfere; and see *ante*, p. 423.)

*Q.*—What is the rule as to making parties to suits, and has any recent

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(*a*) Lord Hale, however, accounts for the appeal to the House of Lords in *equity cases* from the notorious misconduct of Bacon as a judge. See note to Lord Campbell's "Life of Bacon." It is proved that the Lords did not entertain appeals in equitable cases before the reign of Charles I.: (see Hallam's Const. Hist. p. 24, vol. 3, 9th edit.) As to present formation of the court, see 39 & 40 Vict. c. 59, which provides for the appointment eventually of four Lords of Appeal in ordinary (to be life peers) to aid the House in hearing appeals (s. 6), and requires every appeal to be heard before three lords of appeal (law lords) at least (s. 5).

alteration been made in this respect? If so, state your authority, and give one or two examples.

A.—Formerly the rule was, that all persons interested in the subject-matter of the litigation should be parties to the suit. To this rule, however, there were some exceptions. And now, by Order XVI., rr. 32-39, it is not competent to any defendant in any suit to take any objection for want of parties, in any cases to which the rules next thereafter set forth extend. The following are some of the cases referred to :

Any residuary legatee, or next of kin, may, without serving the remaining residuary legatee, or next of kin, have a decree for the administration of the personal estate of a deceased person : (r. 33.)

Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, may, without serving any other legatee or person interested in the proceeds of the estate, have a decree for the administration of the estate of a deceased person : (r. 34.)

Any residuary devisee or heir may, without serving any co-residuary devisee or co-heir, have the like decree : (r. 35.)

Any one of several *cestuis que trust* may have a judgment or order for the execution of the trusts without serving any other *cestui que trust* : (r. 36.)

In actions of waste one person may sue on behalf of himself and all others having the same interest : (r. 37.)

An executor, administrator, or trustee, may have a judgment for the administration of estate or the execution of the trusts against any one legatee, next of kin, or *cestui que trust* : (r. 38.)

In all the above cases, the court, if it shall see fit, may require any other persons to be made parties, &c. : (Rule 39 ; see further Evans, Ch. Pr.)

Q.—Is it necessary that all parties having an interest in real estate should be made parties to a writ against trustees, in order to carry the trusts into execution, or will it be sufficient to make the trustees only parties to the writ ?

A.—In all suits concerning real and personal estate, which is vested in trustees, they now represent the persons beneficially interested under the trust, and it is *not* necessary to make the *cestuis que trust* parties to the suit ; but the court or a judge may at any stage of the proceedings order any of them to be made parties either in addition to or in lieu of the previous parties thereto : (Ord. XVI., r. 37, and *sup.*)

Q.—In a case in which the right of an heir-at-law depends upon the construction which the court can put upon an instrument, and it is difficult to ascertain who is such heir-at-law, can the judgment of the court upon the construction of the instrument be obtained without the expense of first finding the heir at law ? If so, how ?

A.—In this case the court may appoint some one or more person or persons to represent such heir-at-law, and the judgment of the court will then bind him : (Ord. XVI., r. 32 ; see *Re Pepitt's Estate, Chester v. Phillips*, 46 L. J. 95 Ch.)

Q.—Is the Attorney-General a necessary party to an action, the subject of which is a legacy given to a charity already established ?

A.—In all actions relative to charitable funds, the Attorney-General must be made a party; he need not be made a party, however, when a private charity is the subject of the action, nor in respect of a legacy given to a charity, on a writ issued against an executor for an account: (Gold. Eq. 223, 4th edit.)

Q.—Is a bankrupt a necessary party to a writ issued against his trustee?

A.—Not generally; because the interests of a bankrupt (whether legal or equitable) are vested in his trustee or trustees by virtue of their appointment: (Bro. C. C. 228.) If, however, fraud and collusion between the trustee and the bankrupt be charged, the bankrupt may be made a party defendant: (see Rede. Plead. 162.) Or if a discovery is sought: (Ayck. Pr. 631, 9th edit.)

Q.—By whom does the Sovereign sue, and how, and who is the *dominus litis* or plaintiff of such a suit, and who is responsible for its conduct? Must a Queen Consort sue in like manner?

A.—The Sovereign sues by writ (formerly information) exhibited in the name of his Attorney or Solicitor General as the informant, who is the *dominus litis* or plaintiff of every writ issued (or information filed) in his name either *ex officio* or in the name of a relator. But the relator, if one, is answerable for the propriety of the proceedings and the conduct of the action. The Queen Consort, partaking of the prerogative of the Crown, sues (or informs) by her Attorney-General: (Sm. Pr. 268, 269, 7th edit.)

Q.—To a writ issued by a *cestui que trust*, is the trustee a necessary party?

A.—Yes; the trustee must be made a party.

Q.—In actions to carry into execution the trusts of a will, in what cases is it necessary or desirable that the heir-at-law should be made a party?

A.—When the plaintiff desires to have the will established against him: (see Ord. XVI., r. 45; Evans, Ch. Pr. 572.)

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### COMMENCING PROCEEDINGS, &c.

Question.—State the several modes in which matters may be commenced in this Division of the High Court, and state with respect to each mode some of the matters to which it is applicable.

Answer.—1. By writ, in all cases where the old mode of proceeding was by bill or information. The bill was used in cases where one person sought equitable relief against another, and which relief could not be obtained by petition or summons, and the information was used where the rights of the Crown was concerned.

2. By petition, where relief is sought, but from the nature of the case the court grants it in a summary way, without regarding the general proceedings by writ, as in matters of lunacy or charity.

3. By summons, which is heard at chambers, but sometimes adjourned

into court, and is applicable where summary relief is sought, as to obtain the appointment of guardians for infants, administration, or the like.

**Q.**—Explain the procedure by which parties interested in the subject-matter of an action, and not made plaintiffs or defendants, are brought before the Court.

**A.**—By Ord. XVI., r. 48, where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, he may, by leave of the court or a judge, issue a notice called the third-party notice to that effect, stamped with the seal with which writs of summons are sealed. A copy of such notice shall be filed with the proper officer, and served on such person according to the rules relating to the service of writs of summons. The notice shall, unless otherwise ordered by the court or a judge, be served within the time limited for delivering his statement of defence, with a copy of the statement of claim, or if there be no statement of claim, then a copy of the writ of summons in the action. The third party must then enter an appearance within eight days from the service of the notice. The defendant giving the notice then applies for directions: (*Ib.*, rr. 49, 52.)

**Q.**—State some of the cases in which the assistance of the court can be obtained by petition.

**A.**—Application for vesting orders—The appointing of new Trustees—For leave to marry an infant ward of court—For an infant to make a marriage settlement—For leases and sales under the Settled Estates Act. To wind up a Registered Company, and others too numerous to mention, are made by petition.

**Q.**—State some of the principal matters commenced before a judge at chambers.

**A.**—Application as to the guardianship of infants, except for guardians *ad litem*; and as to the maintenance of infants. For administration of estates. Under the Legacy Duty Act for payment of money out of court. Under the Drainage Act. Under sect. 32 of 36 Geo. 3, c. 52, and the 10 & 11 Vict. c. 96, where the fund does not exceed 1000*l.*, &c.; Ord. LV., r. 2.) (a) So applications by husband and wife under the Married Woman's Property Act, 1882, may be made at chambers, and by vendor or purchaser under 37 & 38 Vict. c. 78, s. 9, and cases under 44 & 45 Vict. c. 41. See Ord. LV.

**Q.**—How was a suit commenced under ordinary circumstances, when the rights of the Crown were concerned?

**A.**—By information; exhibited in the name of the Attorney or Solicitor-General, as the informant. The information must have been signed by the Attorney-General, for which purpose counsel must have certified that it was proper for his sanction. A copy of the information was then left with the Attorney-General, together with a certificate by the solicitor that the relator (if one) was competent to pay the costs,

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(a) So the following interlocutory applications must be made at chambers: For time to deliver a statement of claim or defence. For leave to amend. To enlarge the time for taking evidence. For production of documents. As to matters connected with the management of property, and for payment into court of purchase-moneys under sale by order of the court, and investing same.

and that the copy was a true copy of the draft prepared by counsel, and thereupon the information was signed by the Attorney-General: (Ayck. Pr. 280, 9th edit.; Sm. Pr. 268, 7th edit.) A writ is now substituted: (Ord. L, r. 1, Dan. Ch. Pr. 6th edit., 64, note a.)

*Q.*—What was a relator, and when was he a proper party to the suit, and what were his liabilities?

*A.*—A relator was a person named to sustain and direct a suit commenced by information, when the rights of those whom the Crown takes under its protection, as a charity, were infringed. He was liable for the conduct of the suit, and for costs, for which purpose he must have signed a written authority to the solicitor to be filed with the information: (Sm. Pr. 268, 7th edit.; Evans, Ch. P. 581.) This is still necessary with the writ.

*Q.*—How were proceedings commenced when any other party besides the Crown had an interest in the subject-matter of the intended suit; and what steps must have been taken to obtain the Attorney-General's sanction to such suit?

*A.*—When any other person besides the Crown was interested in the subject-matter in dispute (such person sustaining the character of plaintiff and relator) the pleading was called an information and bill: (see references *supra*.) As to the mode of obtaining the Attorney-General's sanction, which is still necessary, see *supra*.

*Q.*—Can a private individual institute an action against a corporation to compel the performance of a public trust, or for exceeding the powers of their Act, or who is able to take such proceedings?

*A.*—In the first case the writ should be issued by the Attorney-General. A person seeking relief against a company for exceeding the powers of their Act must show that he has a private interest in the matter, for otherwise the proceedings must be by the Attorney-General: (Sm. Pr. 290, 7th edit.)

*Q.*—What proceedings may be taken in the Chancery Division of the High Court, and by whom and on what authority when a charity is mismanaged?

*A.*—The most regular and formal mode would be by writ issued in the name and with the sanction of the Attorney-General. So proceedings may be taken by petition under 52 Geo. 3, c. 101, by any two or more persons interested in the charity, first, however, obtaining the sanction of the Attorney-General thereto, or under the 16 & 17 Vict. c. 137, and 18 & 19 Vict. c. 124, with the consent of the Charity Commissioners; and when the annual income of the charity exceeds 30*l.* the application may be made by summons at chambers. The rights of the Attorney-General are excepted, as also suits already begun, and suits adverse to the charity: (Evans, Ch. Pr. 154 *et seq.*)

*Q.*—When the Lord Chancellor was a party to the suit, to whom ought the bill to have been addressed, and by whom ought the cause to have been heard?

*A.*—To the Queen herself in her Court of Chancery; it was heard before judges appointed for the purpose, of whom the Master of the Rolls

was generally one : (see Mitford's Pleadings, 7 ; *Lord Keeper v. Wyld*, 9 Vern. 159.)

Q.—If a solicitor issues a writ without his client's authority, what step should the latter take on discovering the fact ; and if he fails to apply, what would be the consequence to him ; and what would be the consequence to the solicitor, of the party aggrieved satisfying the court of the fact ?

A.—The client, as soon as he discovers the fact, should move the court, on notice, that the copy writ be taken off the file, and that the solicitor pay the cost of issuing it, which will be ordered. If the plaintiff is one of several, he moves that his name be struck out of the writ, and that the solicitor pay the costs of the motion. If he fails to apply with diligence after discovering the fact, the court will consider that he has acquiesced, and refuse his application : (Sm. Pr. 280, 7th edit. ; *Davies v. Davies*, 18 L. T. Rep. N. S. 701.)

Q.—Can parties, defendants, be served with proceedings out of the jurisdiction of the court ; and, if so, how ?

A.—Yes ; by leave of the court, obtained on an *ex parte* motion, supported by affidavit showing where the defendant is resident. The defendant is also served with a copy of the order giving the plaintiff leave to so serve the process. As to service of writ out of jurisdiction, see Order XI.

Q.—What was the distinction between multifariousness and misjoinder as applied to bills in Chancery ; and was there any, and what, difference in their consequences ?

A.—The distinction was this : The former consisted in mixing up several matters in one bill which ought to have been made the subject of different suits ; whilst misjoinder was when persons were improperly introduced as parties to the record ; the difference between the two was often very difficult to distinguish. Either the one or the other formed a ground of demurrer : (see Gold. Eq. 291, 292, 4th edit. ; *Jerdein v. Bright*, 4 L. T. Rep. N. S. 12, 13.) Multifariousness is now allowed in many cases : (see Order XVIII. ; and by Order XVI., r. 11, no action is now to be defeated by reason of misjoinder of parties.

Q.—What is the necessary evidence to support a petition for leave to sue *in formâ pauperis* ?

A.—There must be an affidavit made by the pauper swearing that he is not worth 25*l.*, his wearing-apparel and the subject-matter of the action (and that not in possession) only excepted. This must be accompanied with counsel's certificate that he has a just cause of action, and an affidavit stating that the case sets out all material facts. Upon presenting a petition to the High Court of Justice thus verified, the order will be made : (Gold. Eq. 331, 4th edit. ; Evans, Ch. Pr. 579 ; Ord. XVI., rr. 22-31.)

Q.—Can an executor sue *in formâ pauperis* ? Give reasons for your answer.

A.—As a rule an executor cannot sue *in formâ pauperis*, even although he swear that no assets have come to his hands. But if he has a beneficial interest in the estate he may be admitted so to sue upon a special application : (*Parkinson v. Chambers*, 24 L. J., N. S. 47.)



**Q.**—Can an action be maintained by a plaintiff residing out of the jurisdiction of the court ?

**A.**—Yes ; but he may be called upon, and compelled to give security for costs : (Evans, Ch. Pr. 204 ; Hal. Suit, 93 ; Dan. Ch. Pr. 6th edit. p. 80.)

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### APPEARANCE.

**Question.**—How is a defendant brought before the court ?

**Answer.**—By being personally served with a copy writ, unless an order for substituted or other service, or for the substitution of notice for service, be obtained, and by his appearing thereto : (see Ord. IX.)

**Q.**—Within what period after the issuing of the writ must it be served on a defendant within the jurisdiction ?

**A.**—Within twelve months from the day of the date, or within six months of renewal : (Ord. VIII, r. 1.)

**Q.**—Must a writ be served personally on a defendant ? May it ever be served on the solicitor of the party ?

**A.**—If the defendant by his solicitor agrees to accept service, and enters an appearance, no service is required : (Ord. IX., r. 1.) But if prompt personal service cannot be effected, an order for substituted or other service, or for the substitution of notice for service, may be obtained : (*Ib.*, r. 2.) In case of vacant possession in an action to recover land, it may be posted up on the property : (*Ib.*, r. 9.)

**Q.**—What time is allowed to a defendant to appear ; and is there any difference in a town and country action ?

**A.**—The defendant must appear within eight days after being served with a copy of the writ, inclusive of the day of service, whether in a town or country action : (see Form No. 1 in part 1 of Appendix A. to Rules of Court.) If abroad, the order giving leave for service specifies the time for appearance : (Ord. XI, r. 5 ; and see *ante*, p. 82.)

**Q.**—Are parties out of the jurisdiction compellable to appear to a writ, and if so, how ?

**A.**—The court may order service of a writ out of the jurisdiction, and upon the expiration of the time for appearing the plaintiff upon filing a proper affidavit of service may proceed as if such party had appeared : (Ord. XIII., r. 12.) (*a*)

**Q.**—Can a plaintiff under any and what circumstances make a motion in an action before the defendant has appeared ? And how is the defendant to be served ?

**A.**—Yes ; as where a grievance sought to be restrained is very pressing, a motion for an injunction may be made for that purpose before appearance of the defendant. So, a motion for a writ of *ne exeat regno* may be made before appearance, or for leave to issue or serve a writ out of the

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(*a*) This rule extends to actions assigned by the 34th section of the Act to the Chancery Division and in Probate actions, and in all other actions not by the rules of this order otherwise specially provided for.

jurisdiction; these are *ex parte*, if before service: (Evans, Ch. P. 106.) The plaintiff may serve the defendant with notice of motion, &c., either personally or by leaving same at his dwelling-house: (Ord. LXVII., r. 2.)

*Q.*—Has a plaintiff any means of proceeding against a defendant who absconds in order to avoid being served?

*A.*—Yes, he may obtain an order for substituted service or for notice in lieu of service: (Ord. IX., r. 2.)

*Q.*—Is there any mode of compelling appearance?

*A.*—This is now abolished. When judgment is not signed in default of appearance, the plaintiff on filing a proper affidavit of service proceeds as if the defendant had appeared: (Ord. XIII., r. 12.)

*Q.*—On service of a writ of summons in an action assigned by the 34th section of the Judicature Act, 1873, to the Chancery Division of the High Court of Justice, in case the party served does not appear within the time limited for appearance, how may the plaintiff proceed?

*A.*—Upon filing a proper affidavit of service and of a statement of claim, the action may proceed as if the party had appeared: (Ord. XIII., r. 12.)

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### STATEMENT OF CLAIM.

(See *ante*, p. 84, *et seq.*)

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### INTERROGATORIES FOR THE EXAMINATION OF THE PARTIES.

*Question.*—How may discovery be now obtained?

*Answer.*—In any action where relief by way of damages is sought on the ground of fraud or breach of trust, and in any other action by leave, the plaintiff may at any time after delivering his statement of claim, and the defendant, with or after delivering his defence, may deliver interrogatories for the examination of the opposite party, which must be answered within ten days by affidavit; 5*l.* must be paid into court as security for costs: (Ord. XXXI., and see *ante*, p. 115.)

*Q.*—What is the process to compel an answer to interrogatories?

*A.*—Any party failing to comply with any order to answer is liable to attachment, and, if a plaintiff, to have his action dismissed for want of prosecution; and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the interrogating party may apply for an order to the court or judge to this effect: (Ord. XXXI., r. 21.)

*Q.*—How is an objection to answering the interrogatories to be now taken?

*A.*—Any objection on the ground that it is scandalous or irrelevant, or is not *bona fide* for the purpose of the action, or that the matters inquired into are not sufficiently material at that stage of the action, or on any

other ground, may be taken in the affidavit in answer (Ord. XXXI., r. 6, see *ante*, p. 115), but an application to set aside on the ground that they have been exhibited unreasonably or vexatiously, or to strike out on the ground that they are prolix, oppressive, unnecessary, or scandalous, may be made at chambers within seven days after service of same: (*Ib.*, r. 7.)

### MODES OF DEFENCE. (a)

*Question.*—What were the different modes of defence to a suit in Chancery? and explain the nature of each.

*Answer.*—The defence to a suit in equity might be either by answer, demurrer, plea, or disclaimer:

1. By answer, controverting the case stated by the plaintiff, the defendant might confess and avoid, or traverse and deny, the several parts of the bill, or, admitting the case made by the bill, might submit to the judgment of the court upon it, or a new case made by the answer, or both.

2. By demurrer, when an objection was apparent on the face of the bill, he might demand the judgment of the court whether he should be compelled to answer the bill or not.

3. By plea, when the objection was not so apparent, he might show cause why the suit should be dismissed, delayed, or barred.

4. By disclaimer, he might terminate the suit by disclaiming all right in the matter sought by the bill; and all or any of these modes of defence might be joined, provided each related to a separate and distinct part of the bill: (Ayck. Pr. 90, 9th edit.; Hal. Suit, 21.)

*Q.*—How did a disclaimer differ from an answer?

*A.*—In addition to what has just been said, we may add that an answer claimed, on the defendant's part, some interest in the subject-matter of the suit, whereas a disclaimer disavowed any such right.

*Q.*—Upon what principle was it decided whether a defence should be by plea or demurrer?

*A.*—When a ground of defence was apparent on the bill itself, either from matter contained in it, or from defect in its frame, or in the case made by it, the proper mode of defence was by demurrer. But when the objection, or ground of defence was *not apparent*, so as to admit of a demurrer, the special matter pleaded must have been by plea: (see Ayck. Pr. 111, 120, 9th edit.; Hal. Suit, 24, 27.)

*Q.*—In answering a bill, could a defendant introduce into his answer any other matter than that inquired of by the interrogatories?

*A.*—Yes; the answer of a defendant to any bill of complaint might contain not only the answer of the defendant to the interrogatories filed, but such statements material to the case as the defendant might think it necessary or advisable to set forth therein: (15 & 16 Vict. c. 86, s. 14; Hal. Suit, 21; Ayck. Pr. 95, 9th edit.)

*Q.*—Define what was scandal in a bill or pleading in equity.

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(a) As to statement of defence, see *ante*, p. 91.

**A.**—Scandal was anything alleged in a bill, answer, or other pleading in language which it was unbecoming the court to hear, or anything set forth therein which charged a person with a crime not necessary to be shown in the cause: (Hall. Suit, 37; Ayck. Pr. 343, 9th edit.)

**Q.**—What was the nature and effect of a demurrer formerly in equity?

**A.**—It was a mode of defence used by a defendant which, even admitting, for the sake of argument, the statements in the bill to be true, yet insisted upon some defect apparent on the face of the bill, either from matter contained in it, or its frame, or in the case made by it, and contended that the plaintiff was not entitled to relief, or to an answer from the defendant: (Ayck. Pr. 111, 9th edit.; Hal. Suit. 24; Haynes' Eq. 72.)

**Q.**—What proceedings are now substituted in lieu of demurrer?

**A.**—No demurrer is now to be allowed; but either party may raise by his pleading (a) any point of law, and any point so raised shall be disposed of by the judge who tries the cause, at or after the trial, provided that by consent of the parties or order of the court the same may be set down for hearing and disposed of at any time before the trial: (Ord. XXV., r. 2.) The court may also order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in such case, or if it is frivolous or vexatious, the court may order the action to be stayed or dismissed: (*Ib.*, r. 4.)

## AMENDMENT OF PLEADINGS.

**Question.**—How can pleadings be amended?

**Answer.**—The court or a judge may, at any stage of the proceedings, allow either party to alter or amend pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties: (Ord. XXVIII., r. 1.) And may order to be struck out or amended any matter which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action, and may in such case order the costs of the application to be paid as between solicitor and client: (Ord. XIX., r. 27.)

**Q.**—When can plaintiff or defendant amend without leave?

**A.**—The plaintiff may, without any leave, amend his statement of claim, whether indorsed on the writ or not, *once* at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, within four weeks from the appearance of the defendant who last appeared. A defendant who has set up in his defence any set-off or counter-claim may, without any leave, amend within the time allowed him for pleading to the reply and before pleading thereto, or in case there be no reply, then within twenty-eight days from filing his defence: (Ord. XXVIII., rr. 2 and 3.)

(a) By sect. 100 of the Judicature Act, 1873, "pleading" includes "any petition or summons, and also the statement in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counter-claim of the defendant."

**Q.**—What steps can the opposite party take in such case?

**A.**—He may, within eight days after delivery to him of the amended pleading, apply to the court or a judge to disallow the amendment or any part thereof, and the court or judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may seem just, or he may plead to the amended pleading or amend his pleading within the time he then has to plead, or within eight days from the delivery of the amendment, whichever shall last expire; and in case the opposite party has pleaded before the delivery of the amendment and does not plead again or amend within the time above-mentioned, he shall be deemed to rely on his original pleading in answer: (*Ib.*, rr. 4, 5.)

**Q.**—Can any amendment be made in other cases than the above?

**A.**—Yes; in other cases application for leave to amend any pleading may be made by either party to the court or a judge in chambers, or to the judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may seem just: (*Ib.*, r. 6.)

**Q.**—Within what time must the amendment be made after order obtained?

**A.**—Within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, and if not amended in either of such times, it will become *ipso facto* void, unless the time is extended by the court or a judge, or by consent in writing of the parties: (*Ib.*, r. 7; and Ord. LXIV., r. 8.)

**Q.**—How are the amendments made?

**A.**—A pleading may be amended by written alterations in the pleading which has been delivered, and by additions on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 144 words in any place, or are so numerous that the making them in writing would render the pleading difficult to read; in either of such cases the amendment must be made by delivering a print of the pleading as amended. An amended pleading must be amended with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made as follows: "Amended———day of———": (Ord. XXVIII., rr. 8, 9.)

**Q.**—What general power has the court of amending defects and errors in proceedings?

**A.**—It may at any time, on terms, amend any defect or error in any proceedings, (a) and all necessary amendments shall be made for the purpose of determining the real question or issue raised: (*Ib.*, r. 12.)

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### REPLICATION. (b)

**Question.**—How is issue joined in an action?

**Answer.**—The plaintiff by his reply, and either party by any subsequent

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(a) Clerical mistakes in judgments or orders or errors therein arising from any accidental slip or omission may at any time be corrected on motion or summons without an appeal: (Ord. XXVIII., r. 11.)

(b) See *ante*, p. 84 *et seq.*

pleading may join issue upon the previous pleading, which will operate as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit: (Ord. XIX., r. 18.)

### EVIDENCE. (a)

*Question.*—How must the parties to an action proceed for the purpose of proving such facts of the case as are not admitted?

*Answer.*—They must prove the facts which are not admitted by evidence as detailed in this chapter: (Ayck. Pr. 155, 9th edit.; Hal. Suit, 46, 47.)

*Q.*—State the modes in which evidence may now be taken in an action.

*A.*—In absence of any agreement between the parties, and subject to the rules, the witnesses at the trial of any action, or at any assessment of damages, are examined *viva voce* and in open court, but the court or a judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial on such conditions as the court or judge may think reasonable, or that any witnesses whose attendance in court ought for some sufficient reason to be dispensed with, be examined by interrogatories, or otherwise, before a commissioner or examiner, but when it appears that the other party *bond fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made to take the evidence of such witness by affidavit: (Order XXXVII., r. 1.)

*Q.*—In what case is evidence taken upon affidavit at the trial of an action, and when must the affidavits of the plaintiffs and defendants in such cases be filed?

*A.*—Where the parties agree that it shall be so taken, or the court or judge so directs: (see Order XXXVII., r. 1.) Where the evidence is taken by affidavits, the plaintiff has fourteen days, or such other time as the parties agree upon or the judge may allow to file his affidavits and deliver a list of them to the defendant, who has the like time to file his in defence. The plaintiff has seven days after this to file his affidavits strictly in reply: (Order XXXVIII., rr. 25, 27.)

*Q.*—State how evidence is now taken upon a motion, petition, or summons.

*A.*—By affidavit, but the court or a judge may, on the application of either party, order the attendance for cross-examination of the person making such affidavit: (*Id.*, r. 1.)

*Q.*—If either party in a cause where the evidence is taken by affidavit is desirous of cross-examining on affidavits filed by the opposite party, before whom is it done and what notice must be given?

*A.*—Such cross-examination is taken before the court at the trial. The



party desiring to cross-examine must serve upon the party by whom the affidavit was filed a written notice requiring the production of the witness for cross-examination before the court at the trial; such notice to be served before the expiration of fourteen days next after the time allowed for the filing affidavits in reply; or within such time as the court or judge may specially appoint: (Ord. XXXVIII., r. 28.)

*Q.*—Are witnesses out of the jurisdiction compellable to give evidence, and how is evidence obtained in such cases?

*A.*—Formerly where witnesses were out of the jurisdiction their evidence might be obtained by commission. By the 6 & 7 Vict. c. 82, ss. 5 and 6, powers were given to the courts of law or equity in England or Ireland, or the courts of law in Scotland, to compel by rule or order the attendance of witnesses for examination before the Commissioners. And by 22 Vict. c. 20, the provisions of the above-mentioned Act were extended to the examination of witnesses out of the jurisdiction and within any of Her Majesty's dominions, colonies, or possessions abroad under or by virtue of any commission, order, or other process of any court of competent jurisdiction in Her Majesty's dominions; or the testimony of such witnesses can be obtained by having them examined before a special examiner appointed for the purpose. The application for the appointment of the examiner is made at chambers on summons: (see *Crofts v. Middleton*, 22 L. J. 706, Ch.; *Reed v. Prest*, Kay, App. 15; *Evans*, Ch. Pr. 307, 316.) Ord. XXXVII., r. 5, applies now to all such cases.

*Q.*—Are there any cases in which one party may examine another party to a suit as a witness? If so, give instances in which such examination can take place, and to what extent will it be permitted.

*A.*—By the 14 & 15 Vict. c. 99, parties to suits, &c., are now competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the suit, &c.: (sect. 2.) But this section does not render any person compellable to answer any question tending to criminate himself or herself (sect. 3; and see Hal. Suit, 31, 36), and opposite parties may examine each other on interrogatories: (Ord. XXXI., r. 1.)

*Q.*—How is the attendance of a witness to be enforced for the purpose of examining him before the examiners? (*a*)

*A.*—By serving him with a *subpœna ad testificandum*. The service of a subpœna is effected by delivering a copy of the writ and the indorsement thereon, and at the same time producing the original writ: (Ord. XXXVII., r. 32.) The reasonable expenses of the witness should be paid him at the same time: (Hal. Suit, 59.)

*Q.*—If a witness, who has been served with a *subpœna ad testificandum* neglects to attend, what remedy have the parties to an action?

*A.*—They may obtain an order for the witness to attend, or that in default he may be committed for contempt: (Ayck. Pr. 190, 9th edit.)

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(*a*) The court or judge may order him to be examined before a commissioner or examiner when his attendance in court ought for some sufficient reason to be dispensed with (Ord. XXXVII., r. 1), and it may also be necessary when the evidence is not required for the hearing or trial.

He is also liable to an action for damages, or for a penalty under 5 Eliz. c. 9, s. 12.

Q.—Must a *subpœna ad testificandum* be served personally on the witness, or will the mere leaving it at his house be sufficient?

A.—A copy of the subpœna must be personally served upon the witness, and the original, at the same time, shown to him; leaving it at his house is not sufficient. His necessary expenses should also be paid or tendered to him: (Evans, Ch. Pr. 318.)

Q.—For what period of time, after notice of a witness being under examination before an examiner, must the party examining such witness keep him in town for the purpose of his being cross-examined?

A.—Forty-eight hours after service of the written notice upon the adverse solicitor: (Gold. Pr. 342, 4th edit.; Drew. Pr. 48.)

Q.—If a party omits to avail himself of the time allowed him for cross-examination referred to in the last question, is he thereby precluded from such cross-examination altogether, or can he on any, and what terms, still procure such cross-examination?

A.—He may cross-examine the witness, but at his own expense: (Gold. *sup.*; Drew *sup.*; Ayck. Pr. 175, 9th edit.)

Q.—What is the meaning of examining witnesses *de bene esse*; and when is it advisable to do so?

A.—Examining witnesses *de bené esse* means examining them conditionally. When a witness is seventy years old or upwards, or is in a dangerous state of health, or is about to go abroad, whereby his evidence is liable to be lost, an order may be obtained to examine him *de bene esse*. So where a matter of great importance is in the knowledge of one witness only, though not old or infirm, the order will be granted: (Evans, Ch. Pr. 305.)

Q.—Can either party read a portion only of the opposite party's answer to interrogatories?

A.—Any party at the trial may use in evidence any answer of the opposite party to interrogatories without putting in the others, but the judge may look at the whole and order any of them to be put in if connected with the former: (Ord. XXXI., r. 24.)

Q.—For and against whom was a decree in a cause evidence, and how were its contents proved?

A.—A decree in Chancery might be given in evidence between the same parties, or any claiming under them: (*Duchess of Kingston's case*, 2 Sm. L. C. 445, *in notis.*) The contents of the decree might be proved by the production of the decree itself, or by a duly certified office copy: (Drew. Pr. 109, 110; and see Pow. Ev. 250.)

Q.—How are proceedings in the Chancery Division of the High Court of Justice proved?

A.—Generally by office copies, but they may also be proved by producing the original document from proper custody and identifying it, or by examined copies: (Stephen's Digest of Evidence, 3rd edit., p. 78.)

Q.—What are the modes by which the execution of deeds or the hand-

writing of letters may be proved for the purpose of being given in evidence on the hearing of the cause?

A.—Deeds, &c., which require proof of their execution by a subscribing witness, or letters, &c., of which proof must be made of the handwriting of the persons writing or subscribing the same, are all considered as exhibits, and may be proved *vivâ voce* or by affidavit. An order of course, is first necessary: (Dan. Ch. Pr. 6th edit., 608.)

Q.—What evidence is necessary to establish the validity of a deed, purporting to be executed by attorney under a power?

A.—Proof must be given that the person who gave the power had not revoked it or died before the execution of the deed. This may be shown by statutory declaration or other satisfactory evidence.

But a power given for valuable consideration, may be expressed to be irrevocable in favour of a purchaser. The deed would then be valid notwithstanding revocation, &c., and whether given for valuable consideration or not, and may be made irrevocable in favour of a purchaser (which word includes lessee or mortgagee), for a fixed time not exceeding one year: (45 & 46 Vict. c. 39, ss. 8, 9.)

Q.—In an action by an incumbrancer against a purchaser for valuable consideration, in which such purchaser is sought to be affected with notice of the incumbrance, and in which such notice is proved by one witness only, but is positively and expressly denied by the defendant, in whose favour will the court decide?

A.—The court will decide in favour of the purchaser, unless the testimony of the witness is supported by corroborative circumstances of sufficient weight; because the denial of the facts by the defendant on oath is equally strong with the affirmation of them by one witness unsupported by corroborative circumstances. But it would be otherwise if so supported, or if there were two witnesses: (see Dan. Ch. Pr. 6th edit., 577; Gold., Pr. 312, 4th edit.)

Q.—At what distance of time do deeds, bonds, and other writings prove themselves, and thereby render their proof unnecessary?

A.—When they are thirty years old and upwards, and come out of the possession of the party entitled thereto: (Ayck. Pr. 150, 9th edit.; Hal. Suit, 48; Pow. Ev. 307.)

Q.—When, and in whose behalf, is parol evidence admissible to explain or vary a written contract?

A.—As before seen (*ante*, p. 107), parol evidence may in all cases of doubt be received to *explain* a written contract. A parol variation will only be received on behalf of a defendant resisting specific performance, and not by a plaintiff seeking such performance; except (1) where there has been a part performance of the parol portion, or (2) where an omission has occurred by fraud, or (3) where the parol variation set up by the plaintiff is not objected to by the defendant: (see St. Eq. § 170, and note; *Woollam v. Hearn*, 2 L. C. Eq. 405, 2nd edit.)

Q.—Can a defendant enforce production of documents in the plaintiff's possession? If so, how, and at what period of the action?

A.—Any party may apply to a judge for an order directing any other party to the action to make discovery on oath of the documents which are

or have been in his possession or power: (Ord. XXXI., r. 12.) The affidavit must state what documents are objected to be produced: (*Ib.* 13.) Notice to produce any such document for inspection can then be given (*Ib.* 15), and, in default, the judge may order inspection (*Ib.* 17). (a) Except in special cases, the order will not be made before delivery of statement of defence. The time to apply is after putting in his defence: (see Nos. CCLXXVI., and CCXCI., Bitt. Prac. Cas.)

Q.—Can a defendant obtain an order for production of documents by a co-defendant? and, if so, how?

A.—See last answer.

Q.—State the course of proceeding for compelling the production (for the purpose of inspection) of documents in the defendant's possession which are considered material to the plaintiff's case, and the earliest time when such proceedings may be taken.

A.—The plaintiff should take out a summons at chambers, and obtain an order for the production by the defendant, upon oath, of documents in, or which have been in, his possession or power relating to the matters in question in the action as above stated. The application may be made, in special cases, as soon as the defendant has appeared: (*Ley v. Marshall*, No. CCXVIII, Bitt. Prac. Cas.), but otherwise not till after statement of claim has been delivered: (*Ib.*, No. CCLV.) 5*l.* must be paid into court as security for costs: (Order XXXI., r. 25.)

Q.—What is the practice with regard to the production of books, accounts, and documents, the possession of which is admitted by the defendant; and, if they relate to other matters besides those which are the subject of the suit, how is the defendant protected from such other matters being disclosed to the plaintiff?

A.—As to the books and documents admitted, and which relate to the matters in question in the suit, not being privileged (see *infra*), the court will order their production. If books, &c., relate to other matters besides those which are the subject of the suit, such parts will be directed to be sealed up; but an affidavit must be made of the facts: (Ord. XXXI. r. 15.)

Q.—Are there any, and what, documents stated in the affidavit which are privileged from production?

A.—Yes; documents which do not relate to the plaintiff's title. So confidential communications made between solicitor and client, acting merely in the relation of solicitor and client, and which took place either in the progress of the suit or with reference to the suit previous to its commencement, are privileged. So, if the documents are in the hands of the party's solicitors, as solicitors for him and other persons not parties to the action, production will not be ordered: (see fully *Evans*, Ch. Pr. 285.)

Q.—Which, if any, of the following documents are privileged from production by the defendants in an action under an order for discovery obtained by the plaintiff?

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(a) It appears that discovery of documents should be obtained by order, and not by way of interrogatories: (Nos. CXLI. & CLXXXVIII., Bitt. Prac. Cas.)

- (a) Letters from persons not parties to the action to the defendant marked "private and confidential."
- (b) Documents meant to criminate the defendants.
- (c) Letters passing between a defendant and his solicitor before the litigation was in contemplation.
- (d) Letters from one defendant to another during the litigation and with reference thereto.

A.—(a) These are not. But plaintiff will be put on an undertaking not to use them for objects outside the order: (*Hopkinson v. Lord Burleigh*, L. Rep. 2 Ch. 447.)

(b) These are privileged: (*Rice v. Gordon*, 13 Sim. 580.)

(c) These are: (*Minet v. Morgan*, L. Rep. 8 Ch. 361.)

(d) These are not: (*Goodall v. Little*, 1 Sm. N. S. 155.)

Q.—Are secrets revealed to a clergyman in his religious character, and disclosures to a medical man necessary to enable him to treat the patient, respectively "privileged" communications?

A.—Such communications are not privileged: (Stephen's Dig. of Evidence, 3rd edit. 118; but as to clergymen, see *ib.* note xlv.)

Q.—What is the ordinary rule as to the place where, and the person with whom, documents will be ordered to be lodged for the inspection of the plaintiff; and is this rule ever relaxed?

A.—The documents are to be left or deposited in the Central Office, and are to be subject to such directions as may be given for the production thereof: (Ord. LXI., r. 30.) When the suit is amicable it is usual for the plaintiff to allow the documents to remain in the defendant's possession, and to take the inspection at his solicitor's office, instead of their being deposited, which is a considerable saving of expense: (Ayck. Pr. 354, 9th edit.; Hal. Suit, 52.) By Ord. XXXI., r. 14, the court may deal with such documents when produced as appears just. By *Ib.*, r. 17, the inspection ordinarily will be at the solicitor's office. By sect. 66 of the 1873 Act the production may be ordered at the office of the district registrar.

Q.—Give a form of admission of documents in a suit between plaintiff and defendant.

A.—IN THE HIGH COURT OF JUSTICE (CHANCERY DIVISION.)

Between A. B., plaintiff, and  
C. D., defendant.

We, the undersigned Messrs. —, solicitors for the above-named plaintiff, and Messrs. —, solicitors for the above-named defendant, do hereby on behalf of the parties for whom we respectively act as such solicitors as aforesaid, mutually agree upon the following admissions, and that the same may be used and read as evidence upon the trial, and for all purposes of this action, save and except all just causes of exception to the admissibility of the same by either of the said parties.

(The documents are then set out, and the admission signed by the solicitors.) (a)

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(a) Any plaintiff to an action may give notice, by his own statement or otherwise, that he admits the truth of the whole or any part of the case stated or referred to in the pleadings (Ord. XXXII., r. 1), and either party may give notice to the other to admit documents (*Ib.*, r. 2.); or facts (*Ib.*, r. 4).

Q.—Can infants or persons of unsound mind consent to any order?

A.—They may, with the sanction of the court or judge in chambers, consent, by their next friend, guardian, committee, &c., to an order as to the mode of taking evidence, or other procedure: (Ord. XVI., r. 21.) A compromise on behalf of an infant may be obtained on petition supported by affidavit of a solicitor that counsel's opinion has been given that the compromise is for the benefit of the infant: (*Gray v. Paull*, 46 L. J. 818, Ch.)

Q.—What is the present form in which an affidavit should be made, and what is the consequence if such form be not observed?

A.—It must be expressed in the first person of the deponent, divided into paragraphs numbered consecutively, and each paragraph, as nearly as may be, confined to a distinct portion of the subject: and *each* statement should show the deponent's means of knowledge. The jurat is written at the foot of the affidavit. If the affidavit be not expressed in the first person, no costs are allowed for preparing and filing it. And it must be stated at the foot of the affidavit, and on whose behalf it is filed, otherwise it cannot be used. When the evidence is taken by affidavits under Ord. XXXVIII., or where the parties consent, or the court or judge so order, they are to be printed: (*Ib.*, r. 30.)

Q.—In an affidavit stating facts partly within the deponent's own knowledge, and partly derived from information of others, how must the facts be stated in order to make the affidavit good evidence?

A.—By Order XXXVIII., r. 3, affidavits must be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief with the grounds thereof may be admitted.

Q.—How may an affidavit be sworn by a person resident in Scotland?

A.—Before any judge, court, notary, public, or person lawfully authorised to administer oaths there; and will be received as evidence in the court here if so sworn: (15 & 16 Vict. c. 86, s. 22; Ord. XXXVIII., r. 6; Hal. Suit; Evans, Ch. Pr. 328.)

Q.—What must be done to enable you to use, in support of a motion, an affidavit filed before the date of the notice; and what to use one filed after the date?

A.—In the first case, notice of your intention must be given to the opposite solicitor, as he is not bound to search for an affidavit of an earlier date than the notice. No notice need be given of the intention to use affidavits filed after the notice; for these the opposite solicitor must search. But affidavits filed after the motion has begun cannot be read on such motion: (see Sm. Pr. 638, 639, 7th edit.; Ayck. Pr. 320, 9th edit.)

Q.—Within what time must the evidence be closed?

A.—When the evidence is taken by consent by affidavits the plaintiff has fourteen days, or such other time as the parties may agree upon, or the judge may allow, to file his affidavits and deliver a list of them to the defendant, who has the like time. The plaintiff has seven days after this to file his affidavits strictly in reply. Within fourteen days of the expiration of this time either party desiring to cross-examine a witness must



give notice requiring his production for that purpose before the court at the trial: (Ord. XXXVIII., r. 28.)

*Q.*—To whom must you apply for an order to enlarge the time for closing evidence?

*A.*—Application must be made to a judge at chambers on summons: (Hal. Suit, 60.)

*Q.*—Explain the mode of preparing the brief for counsel on the hearing of an action.

*A.*—The brief for either plaintiff or defendant, when the cause is to be heard on affidavit evidence, consists of a printed copy of the pleadings, and of all the affidavits and written copies of the exhibits, of the affidavits of documents, and in reply to interrogatories, notices to admit and produce and the admissions; for the whole of the evidence is open to all parties now: (*Lord v. Colvin*, 1 Jur. N. S. 208.) To these should be added any observations that may be thought necessary: (Ayck. Pr. 206, 9th edit.) When the case is tried by *vivâ voce* evidence the proofs of the witnesses and copies of the documents referred to in the pleadings or to be proved by the witnesses must be supplied in lieu of the printed evidence.

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#### NOTICE OF TRIAL. (a)

*Question.*—When an action is at issue in the Chancery Division, before whom must it be set down for hearing?

*Answer.*—Notice of trial is given and it is set down for hearing before the judge to whose court it is attached, unless removed by special order of the Lord Chancellor, or the case is tried before a referee.

*Q.*—Within what time after close of the pleadings must the plaintiff give notice of trial?

*A.*—The plaintiff, having obtained no order to enlarge the time, must, within six weeks after the close of the pleadings, either obtain a consent to take the evidence by affidavit, or give notice of trial by one of the different modes set out in Ord. XXXVI., otherwise any defendant may do so, or may move to dismiss: (*Ib.*, r. 12.)

*Q.*—Within what time after evidence is closed must notice of trial be given?

*A.*—Within the same time as provided after close of pleadings: (see last answer; Ord. XXXVIII., r. 30.)

*Q.*—Can a defendant give notice of trial?

*A.*—Yes; if, after the evidence or the pleadings are closed, the plaintiff neglects to do so, any defendant, after the expiration of six weeks, may do so, or he may move to dismiss the action: (Ord. XXXVI., r. 12.)

*Q.*—How should the plaintiff proceed to get the action marked “short?” and what notices must be proved to have been served should the defendant not appear at the trial of a “short cause?”

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(a) See *ante*, p. 96 et seq.

*A.*—He should draw up a certificate which must be signed by the counsel in the action, upon producing which to the proper officer, he will mark the action as short and file the certificate. Notice must then be served on the solicitors of the opposite parties that the action has been marked as short. Previously to the hearing of the action minutes of the proposed judgment are prepared by the plaintiff's junior, and submitted to the junior counsel for the different defendants, and a copy left with the judge's papers. An affidavit of service of the notice is necessary if the defendant does not appear: (Evans' Ch. Pr. 805; Haynes' Out. p. 97, 4th edit.)(a)

*Q.*—A plaintiff who has issued a writ in the Chancery Division desires that the action shall be tried by a jury. In what way should he proceed?

*A.*—The plaintiff should obtain an order to have it so tried (Ord. XXXVI., r. 6) in which case the action is entered for trial with the associate instead of with the Chancery registrar: (see Charley's Practice, 632, 3rd edit.)

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### THE TRIAL.

*Question.*—How is an action in the Chancery Division now brought to a hearing?

*Answer.*—If the defendant makes default in delivering a defence or demurrer (except in the cases mentioned in the prior rules of the Order), the plaintiff may set down the action on motion for judgment: (Ord. XXVII., r. 11.) Where no default is made, he must give notice of trial as required by Ord. XXXVI.

*Q.*—When an action has proceeded to trial, and is then ascertained to be defective for want of parties, does, or does not, that form a ground for dismissal of the action, or will the court adopt any other, and if so what, course in consequence of such defect?

*A.*—It is not a ground for dismissal; formerly the court would order the plaintiff, within a certain time, to make good the defect, or in default dismiss it with costs: (see *Leyland v. Leyland*, 6 L. T. Rep. N. S. 342; Ayck. Pr. 34, 9th edit.) And if a plaintiff having an interest died leaving a plaintiff without an interest, the court might at the hearing order the action to stand revived, and proceed to a decision thereof: (15 & 16 Vict. c. 86, s. 49; Hal. Suit, 5.) Now, by Ord. XVI., r. 11, no action is to be defeated by reason of the misjoinder of parties, and the court or judge may order any names improperly joined to be struck out, and any necessary parties, either plaintiffs or defendants, to be added, but no parties can be added without their consent.

*Q.*—What questions or issues may be referred to a referee *under the Judicature Act*, and what are his powers?

*A.*—Any questions arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice or before the

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(a) No cause should be set down as short unless the evidence is by affidavit: (per Jessel, M.R., W. N. 1875, p. 193.)

Court of Appeal may be referred by the court *for inquiry and report*, to any official or special referee; and the report of any such referee may be adopted wholly or partially by the court, and may (if so adopted) be enforced as a judgment by the court: (1873 Act, s. 50.) And where all persons interested and under no disability consent, or without consent in cases requiring prolonged examination of documents or accounts or scientific or local investigation which cannot be conveniently made before the court or a jury, the court may at any time, on such terms as may be thought proper, order any question, or issue of fact on any question, of account arising therein, *to be tried* either before an official referee or before a special referee to be agreed on between the parties: (*Ib.*, s. 57.)

The referees are officers of the court. The report of any referee upon any question of fact on any such trial is (unless set aside by the court) equivalent to the verdict of a jury: (*Ib.*, s. 58.)

By Order XXXVI., rules 48–52, the referee may hold the trial at any place he may deem most convenient, and have any inspection or view, either by himself or with assessors, and shall proceed with the trial *de die in diem*, in a similar manner as in actions tried by a jury. He has the same authority as a judge at Nisi Prius, except the power of commitment for contempt or enforcing orders by attachment. He may also before the conclusion of the trial submit any question arising therein for the decision of the court, or state any facts specially with power to the court to draw inferences therefrom.

*Q.*—If a cause has been tried, and a judgment given, before whom must the cause be heard on further consideration?

*A.*—Before the judge to whose court it is attached, unless removed by special order of the Lord Chancellor: (Ayck. Pr. 416, &c., 9th edit.; Hal. Suit, 77.)

*Q.*—What are the accounts and inquiries usually inserted in a judgment made on the trial of an ordinary administration action?

*A.*—1. An account of the personal estate of the testator not specifically bequeathed. 2. An account of his debts. 3. An account of his funeral expenses. 4. An account of the legacies and annuities (if any) given by his will. 5. An inquiry what parts (if any) of his personal estate are outstanding. 6. Who are the next of kin. The above only relate to personal estate, but if there is real estate to be administered corresponding inquiries with respect to it are made: (see Form App. L. No. 28 to Judicature Rules.)

*Q.*—What time must elapse between the service of a notice of motion and the day named in the notice for the hearing of the motion?

*A.*—On special motions two clear days must elapse; and to appoint a guardian for an infant or person of unsound mind to defend a suit, six clear days must elapse: (Evans, Ch. Pr. 549.)

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## JUDGMENTS AND THEIR ENFORCEMENT.

*Question.*—Who draws up orders made upon motion or petition? And describe what is to be done by the solicitor before they are completed and fit to be acted on.

*Answer.*—Orders on special motions or petitions are drawn up by the registrar. The solicitor having the carriage of the order, within seven days after it is pronounced, leaves with the registrar counsel's briefs and all necessary documents; he then calls for the draft order and gets an appointment to settle, which is served on the opposite party one clear day prior thereto, the parties attend the registrar and the order is settled and an appointment given for passing, and the parties again attend for that purpose. The order is then entered. Before it can be enforced it must be properly indorsed and served: (Ord. LXII., rr. 4-18.)(a)

*Q.*—By what judge are orders of course usually made, and if irregularly obtained by what judge must they be discharged?

*A.*—They are not now made in the name of any particular judge, the application to discharge the order must be made to the judge to whom special applications in the cause or matter ought to be made: (Dan. Ch. Pr. 6th edit., 1545.)

*Q.*—What is the practice on drawing up, passing, and entering orders on petitions of course?

*A.*—These orders are now drawn up, passed, and entered by the Registrar of the Chancery Division: (Ord. LXII., r. 18.)

*Q.*—What must be done to obtain an order making absolute a previous order *nisi* when no cause has been shown?

*A.*—The motion requires no notice, but the application must be supported by the registrar's certificate of no cause having been shown, and an affidavit proving service of the order *nisi* either upon the party himself when such service is required to be personal, or in the prescribed manner where personal service is not required or has been dispensed with: (Dan. Ch. Pr. 1548, 6th edit.)

*Q.*—Can persons, not parties to an action, enforce obedience to an order, and can such obedience be enforced against them?

*A.*—Every person not being a party in an action, who has obtained, or in whose favour an order has been made, may enforce obedience to such order by the same process as if he were a party to the action; and it may be enforced against him by the same process as if he were a party to the action if obedience may be enforced against him: (Ord. XLII., r. 26; Hal. Suit, 70.)

*Q.*—Does an order generally take effect from the time when it is pronounced, or from the time when the same is served?

*A.*—Generally from the time when it is served; it being ordered that before any proceedings can be taken to enforce an order, the same must be served on the party against whom obtained. And it must state the time, or the time after service, within which the act is to be done. In the case of an order for an injunction the practice is to serve the party enjoined personally with notice in writing that the injunction has been granted, and that the order will be drawn up and served as soon as it can be passed through the offices, which will be sufficient to render the party

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(a) As to what course is to be taken when the solicitor of one of the parties refuses to produce his counsel's brief, see *Yeatman v. Reed* (13 L. T. Rep. N. S. 530).

enjoined guilty of contempt in case of disobedience: (Dan. Ch. Pr., 6th edit., 1616.)

*Q.*—If a plaintiff's solicitor, having the carriage of a judgment, delay the prosecution of it, has the defendant any, and what remedy?

*A.*—If he delays passing the judgment, the defendant has a remedy by motion to the court. The motion may be "that the plaintiff's solicitor may forthwith return to A. B., the registrar, the judgment made on the hearing of the action, on such a day, which was by him drawn up, in order that the party applying may have a copy thereof, and that the same may be passed and entered," or according to circumstances (see 4 Beav. 386; Dan. Ch. Pr., 6th edit., 808); but if it is the subsequent prosecution of the judgment which is delayed, defendant should take out a summons at chambers to have the carriage of the judgment.

*Q.*—How are judgments and orders of the court for payment of money enforced?

*A.*—A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any court whose jurisdiction is transferred might have been enforced, *i.e.*, by *fieri facias*, *elegit*, or sequestration, and in certain cases under the Debtors Act, 1869, by *ca. sa.* If for payment into court it may be enforced by sequestration, or when attachment is authorised by law by attachment: (Ord. XLII., rr. 3 and 4.)

*Q.*—How are other judgments enforced?

*A.*—If for the recovery or delivery of possession of land, by writ of possession: (*Ib.*, r. 5.)

If for recovery of any property other than land or money, by writ for the delivery of the property, by attachment or sequestration: (*Ib.*, r. 6.)

If for requiring a person to do any act other than the payment of money, or to abstain from doing anything, by attachment, or by committal: (*Ib.*, r. 7.)

Formerly a decree or order in equity required to be served in all cases before being enforced.

*Q.*—How may payment of a judgment debt be enforced where the sole property of the debtor consists of an equity of redemption in fee?

*A.*—Where the writ of *elegit* cannot be enforced by reason of the legal estate being outstanding, the execution creditor may issue a writ in the Chancery Division for equitable execution; *i.e.*, to have the lands delivered in execution to him in equity: (see *Anglo-Italian Bank v. Davies*, 9 Ch. Div. 275.)

*Q.*—If a party to a suit, who is ordered by the court to execute a deed, obstinately refuses to do so, is there any, and if any what, mode of giving effect to the order without obtaining the signature of the party?

*A.*—Yes; if he has been committed to or detained in prison for such refusal, the court may, upon affidavit that he has, after the expiration of two calendar months, again refused to execute, order one of the judge's chief clerks, or if the deed is to be executed out of London, a commissioner to administer oaths, to execute such deed for and in the name of such

person; which has the same effect as if executed by the party: (see Hal. Suit, 72.)

*Q.*—How far is a judgment made on the hearing of an action binding, or how can it be made binding, against a defendant who is abroad and does not appear?

*A.*—A defendant by leave may be served with proceedings out of the jurisdiction if he neglects to appear, and the plaintiff, upon filing a proper affidavit of service, may proceed as if he had appeared, and the judgment will bind him: (see Ord. XIII., r. 12.)

*Q.*—In what cases is it now sufficient to serve parties with notice of a judgment, who, according to the former practice, were necessary parties?

*A.*—(1.) In cases where any residuary legatee or next of kin may, without serving the others, have a judgment for the administration of the personal estate of a deceased person; or,

(2.) Where any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, may, without serving any other legatee or person similarly interested, have a judgment for administration; or,

(3.) Where any residuary devisee or heir may, without serving any co-residuary devisee or co-heir, have the like judgment; or,

(4.) Where any one of several *cestuis que trust* may, without serving the others, have a judgment for the execution of the trust; or,

(5.) In cases of actions for the protection of property pending litigation, and, in all cases in the nature of waste, where one person may sue on behalf of himself and all persons having the same interest; or,

(6.) Where any executor, administrator, or trustee may obtain a judgment against any one legatee, next of kin, or *cestui que trust* for administration or execution of the trust: (Ord. XVI., r. 33, *seq.*) And the court or a judge may direct such service in certain cases under rule 40.

*Q.*—What is the consequence to the parties served with such a notice? May they attend the further proceedings?

*A.*—They are, after such service, bound by the proceedings in the same manner as if they had been originally made parties to the action, and they may, upon entering an appearance, attend the proceedings under the judgment, and apply within a month to add to or vary the judgment: (Ord. XVI., rr. 40, 41.)

### SPECIAL CASE.

*Question.*—What relief or benefit was obtained by a special case?

*Answer.*—A special case was framed to meet cases where no relief was claimed, but the parties merely wished for the opinion of the court upon the construction of some document formerly falling within the jurisdiction of equity, except bankruptcy: (a) (see Ord. XXXIV., r. 8.)

(a) The parties may, after writ issued, concur in stating the questions of law arising on the action in the form of a special case for the opinion of the court: (Ord. XXXIV., r. 1.)



## DISMISSING ACTION.

*Question.*—What course must be adopted by a defendant in the event of the plaintiff not proceeding with due diligence?

*Answer.*—If a plaintiff being bound to deliver a statement of claim does not deliver the same within six weeks the defendant may apply to the court or a judge to dismiss the action with costs for want of prosecution: (Ord. XXVII., r. 1.)

If the plaintiff does not within six weeks of the close of the pleadings, or within such extended time as the court or judge may allow, give notice of trial, the defendant may do so or may move to dismiss: (Ord. XXXVI., r. 12.)

When no judgment is directed to be entered at the trial, if the plaintiff does not set down the action on motion for judgment, and give notice thereof to the other parties within ten days after the trial, any defendant may do so: (Ord. XL., r. 2.)

*Q.*—How may an action be dismissed after a judgment?

*A.*—After a judgment the action can only be dismissed upon appeal: (Ayck. *ubi sup.*; Hal. Suit, 80; 11 Ves. 602.)

*Q.*—When a plaintiff is served with a notice of motion to dismiss his action for want of prosecution, what step must be taken for him to prevent such dismissal?

*A.*—He must either deliver his statement of claim, or appear on the hearing of the motion, and ask for such terms as the state of the proceedings may justify: (Ord. XXVII., r. 1.)

*Q.*—After judgment in an administration suit where infants are interested, directing inquiries and reserving further consideration, can the property, the subject of the action, be withdrawn from the jurisdiction of the court by any and what means, and under any and what circumstances, or must it be fully administered under the direction of the court?

*A.*—The case could not be absolutely withdrawn, but further proceedings might be stayed if the court thought that course beneficial for the infants.

## ABATEMENT AND REVIVOR.

*Question.*—Does an action abate by reason of the marriage, death, or bankruptcy of any of the parties?

*Answer.*—Not if the cause of action survive or continue, and it will not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*: (Ord. XVII., r. 1.)

*Q.*—How is such action to be continued?

*A.*—In a case of marriage, death, or bankruptcy, or devolution of estate by operation of law of any party to the action, the court or a judge may, if necessary, order that the husband, personal representative, trustee, or other successor in interest, if any, be made a party to the action, or served with notice thereof in such manner and form as thereafter prescribed, and on such terms as the court or judge shall think just, and shall make such order for the disposal of the action as may be just: (*Ib.*, r. 2.) In case of an assignment, creation, or devolution of any estate or

title *pendente lite*, the action may be continued by or against the person to or upon whom such estate or title has come or devolved : (*Ib.*, r. 3.)

*Q.*—How may such order be obtained ?

*A.*—An order that the proceedings in the action shall be carried on between the continuing parties to the action, and such new party or parties may be obtained, *ex parte*, on application to the court or a judge, upon an allegation of such change or transmission of interest or liability, or of some interested person having come into existence : (*Ib.*, r. 4.)

*Q.*—Upon whom must the order be served ?

*A.*—Unless otherwise directed, it must be served upon the continuing party or parties to the action, or their solicitors, and also upon each such new party unless the person making the application be himself the only new party ; this binds the parties served therewith, and the new parties must enter an appearance in the same manner as if served with a writ of summons : (*Ib.*, r. 5.)

*Q.*—Within what time may the party served apply to discharge or vary such order ?

*A.*—If the party is under no disability or is a *feme covert*, or has a guardian *ad litem* appointed, he may apply to discharge or vary the order within twelve days from the service ; in other cases of disability he may apply within twelve days after a guardian or guardians *ad litem* have been appointed, and the order will have no effect against him in the meantime : (*Ib.*, rr. 6 & 7.)

*Q.*—How and in what cases can the court deal with the rights of a deceased party to a suit who has no personal representative ?

*A.*—The court may either appoint some one to represent the deceased's estate or proceed without one unless a personal judgment is asked against the defendant, or it is the estate of the deceased that is being administered, in which cases some representative must be appointed : (Ord. XVI., r. 46 ; *Silver v. Stein*, 1 Drew. 295.)

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### APPEAL. (a)

*Question.*—To what courts or tribunals do appeals lie against the judgment of the Vice-Chancellor or Justices, and the Lord Chancellor respectively ?

*Answer.*—Against a judgment or order of the Vice-Chancellor or of the Justices, you may appeal to the Court of Appeal, and thence to the House of Lords. Against a judgment or order of the Lord Chancellor, an appeal lies to the House of Lords only : (Ayck. Pr. 387, &c., 9th edit. ; Hal. Suit, 67, 68.)

*Q.*—Can an appeal be made directly to the House of Lords against a judgment of the Vice-Chancellor or Justices, and thus prevent an appeal to the Court of Appeal ; if so, what proceedings are necessary to be taken ?

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(a) See the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), *et ante*, p. 56.

**A.**—Formerly an appeal laid direct against a decree of a Vice-Chancellor, to the House of Lords, if the decree were signed and recognised by the Lord Chancellor and enrolled: (Ayck, *ubi sup.*; Hal. Suit. 67.) But this practice is abolished under the new procedure, and the Court of Appeal must be first resorted to: (*Hastie v. Hastie*, L. T. Notes of Cases, 15th July, 1876.)

**Q.**—Does or does not, an appeal to a superior court necessarily stay proceedings under the judgment or order appealed from?

**A.**—No; if a party appealing is desirous of staying proceedings pending the appeal, he must apply specially for an order for such purpose, as the appeal does not operate as a stay of execution or of proceedings, except as the court appealed from, or any judge thereof, or the Court of Appeal may order: (see Ord. LIV., r. 22; Ord. LVIII., r. 16.)

**Q.**—Suppose a plaintiff appeals to the Court of Appeal from a judgment of one of the Vice-Chancellors, and the court is equally divided in opinion, what is the effect on the judgment of the court below?

**A.**—In such a case the judgment or order appealed from will be deemed to be affirmed: (14 & 15 Vict. c. 83, s. 9.)

**Q.**—If the plaintiff's bill is dismissed with costs, and he appeals to the Court of Appeal, and the appeal is dismissed with costs, and the costs are not paid, can he appeal to the House of Lords before he has paid the costs incurred in the courts below?

**A.**—Yes; but the appeal does not stay the prosecution of the judgment appealed from unless specially ordered; therefore the defendant may proceed for the recovery of his costs in the usual way. And the court has refused to stay such proceedings for recovery of costs pending an appeal: (see Ayck. Pr. 335, &c., 9th edit.)

**Q.**—State the several stages of Appeal in proceedings in the Chancery Division from a certificate of the chief clerk upwards to the House of Lords.

**A.**—If anyone is dissatisfied with the chief clerk's certificate he may by summons apply to discharge or vary it within eight clear days after such certificate is filed: (Ord. LV., r. 70.) From the judge's decision he may appeal to the Court of Appeal, and thence to the House of Lords, if still dissatisfied: (Dan. Ch. Pr. 1282, 6th edit.)

**Q.**—Within what periods must appeals be brought, and from what time are such periods to be calculated?

**A.**—Except by special leave of the Court of Appeal, appeals from interlocutory orders must be brought within twenty-one days, and in other cases within one year. The respective periods are to be calculated in the case of an appeal from an order in chambers from the time when such order was pronounced or when the appellant first had notice thereof, and in all other cases from the time at which the judgment or order is signed, entered, or otherwise perfected, or in the case of the refusal of an application from the date of such refusal: (Ord. LVIII., r. 15.)

**Q.**—Within what time must an appeal be brought from an order on a petition to wind-up a company under the Act of 1862, and from an order under the Trustees Relief Act respectively?

**A.**—By Ord. LVIII., r. 15, an appeal from an interlocutory order must be brought within twenty-one days, except by special leave of the Court of Appeal; and in other cases within a year, except by such leave. The appeal from an order to wind-up must be brought within twenty-one days (*Re The National Funds Assurance Company*, 46 L. J. 183, Ch.), and so an order under the Trustee Relief Act: (*Re Baillie's Trusts*, 46 L. J. 330, Ch.)

**Q.**—How soon must an appeal from an order in the Chancery Division, due notice whereof has been given, be set down for hearing?

**A.**—It must be set down before the day named for the hearing in the notice of appeal; otherwise, the appeal will be dismissed as an abandoned motion: (see Andrew & Stoney's Jud. Acts, note to Ord. LVIII., r. 8.)

**Q.**—If a respondent upon an appeal intends upon the hearing of the appeal to contend that the decision of the court below should be varied, should he give any, and, if any, what notice, and to whom? And what, if any, is the consequence of an omission on his part?

**A.**—Yes, subject to any special order that may be made, the respondent must give eight days' notice of his intention to appeal if it is an appeal from a final judgment, or two days if from an interlocutory order, to the parties who may be affected. The omission to give such notice is not to diminish the powers conferred by the Act upon the Court of Appeal, but may, in the discretion of the court, be ground for an adjournment of the appeal or for a special order as to costs: (Ord. LVIII., rr. 6, 7.)

**Q.**—What rules govern the Court of Appeal as to the reception of evidence not tendered to the court below? If special leave to give such evidence is ever necessary, state in what cases, and how such leave is to be obtained.

**A.**—The Court of Appeal has all the powers and duties as to amendment and otherwise of the court of first instance, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the court: (Ord. LVIII., r. 4.) Where a party is desirous of adducing further evidence upon an appeal, it is sufficient for him to give the other side notice that he will apply at the hearing for special leave to adduce such evidence: (Notes to above Rule, Charley's Judicature Acts, 749, 3rd edit.)

**Q.**—Set forth the various steps from the first judgment of a Vice-Chancellor to the highest court of appeal in the realm.

**A.**—The appeal to the Court of Appeal is by way of rehearing, and is brought on by notice of motion in a summary way: (Ord. LVIII., r. 1. The petition is drawn by counsel, who must certify that there is a reasonable cause of appeal; after which the petition, as well as the certificate,

must be signed by two counsel, who must be either engaged in the court below or on the appeal. The petition is then engrossed, and lodged with the clerk of appeals at the Parliament Office, and notice is given to the opposite party. It is afterwards presented to the House by a peer, who moves that it may be read, upon which the clerk reads the prayer, and the usual order is made. The appellant must give security for costs by recognisance in the sum of 500*l.*, and by bond with two sureties, or by payment of 200*l.* : (Standing Ord. IV., Nov. 1, 1876.) The respondent is then ordered to answer, and as soon as he does this either party may apply to have the cause appointed for hearing. The next step is for each party to prepare his case and appendix for the use of the Lords. About two or three hundred copies are printed, one hundred of which are left with the clerk of appeals, and the rest are exchanged between the appellant and respondent. The appeal is then heard : (Evans, Ch. Pr. 53 *et seq.*

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### COSTS.

*Question.*—If a plaintiff be resident abroad at the time of issuing his writ, can a defendant obtain security for costs ; if so, when must it be applied for ?

*Answer.*—The defendant is entitled to such security, unless the plaintiff be abroad in an official capacity, &c. All the plaintiffs, however, when there are *several*, must be resident abroad. The defendant should apply for the security as soon as he is aware that the plaintiff is abroad, for if he takes any subsequent step in the cause he will waive his right thereto : (Evans, Ch. Pr. 204 ; Hal. Suit, 93.) (*a*)

*Q.*—How is such security obtained and to what amount ?

*A.*—It is obtained by motion or summons. It formerly was in the form of a bond in the penal sum of 100*l.*, given to the clerk of records and writs : (Ayck. Pr. 434, 9th edit. ; Hal. Suit. 93.) But now, by Ord. LXV., r. 6, the security will be of such amount and given at such time or times and in such manner and form as the court or a judge directs.

*Q.*—When a bond is to be given as security for costs, to whom must it be given ? Is there any recent order with respect thereto ?

*A.*—Where a bond is to be given as security for costs, it shall, unless the court or a judge otherwise directs, be given to the party or person requiring the security, not to an officer of the court as formerly : (Ord. LXV., r. 7.)

*Q.*—A person having become security for costs dies pending the suit. Can the defendant oblige the plaintiff to give further security for costs ?

*A.*—If the surety dies or becomes bankrupt pending the suit, the court, upon the application of the defendant, will stay the proceedings until a new surety is appointed : (Sm. Pr. 866, 7th edit.) And for this reason it is usual to give two sureties in order to prevent the expense of renewing the bond : (Ayck. Pr. 435, 9th edit. ; Hal. Suit, 94.)

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(*a*) The plaintiff in a cross suit, if resident abroad, must also give security for costs : (*Tynte v. Hodge*, 7 L. T. Rep. N. S. 849.)

**Q.**—If a person, not a party, takes proceedings in an action, and he is ordered to pay to, or receive from, a party in the action, costs in respect of such proceedings, how are the costs recovered by, or from, such person?

**A.**—The costs are recovered by, or from, such person in the same manner as if he were a party in the action (*viz.*, by attachment, sequestration, *fiery facias*, or *elegit*) : (see Ord. XLII., r. 8.)

**Q.**—Are the costs of an action in the Chancery Division in the discretion of the court in all cases, or are there any, and if any what, exceptions?

**A.**—By Order LXV. the costs are in the discretion of the court ; but this is not to prejudice the right of a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules previously acted upon in the courts of equity ; and costs of trial by jury follow the event, unless upon application made at the trial for good cause shown the judge or court otherwise order.

**Q.**—Give briefly a few of the principal rules governing the discretion of a judge in equity, in allowing or refusing costs of a suit. .

**A.**—The costs are generally in the discretion of the court, but this discretion is subject to certain rules ; for instance, in contentious suits costs generally abide the result : but if occasioned by misconduct of both parties neither has costs ; so the same principle applies where any proceeding is rendered necessary by default of either party. In administration suits the costs are usually allowed out of the estate : (Evans, Ch. Pr. 208.)

**Q.**—What is the present rule in force with regard to the allowance of costs between party and party ?

**A.**—The taxing master may allow to the party entitled to receive such costs all such just and reasonable expenses as appear to have been properly incurred in the service and execution of writs, orders, &c., advising with counsel, &c. But not any costs which do not appear to have been necessary for the attainment of justice, or for defending his rights, or which appear to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party : (Evans, Ch. Pr. 229 ; Hal. Suit, 92.)

**Q.**—In what event is a plaintiff in a creditor's suit entitled to costs out of the estate as between solicitor and client ?

**A.**—Where the fund is insufficient for payment of all the creditors in full : (Morgan & Davey on Costs, 136.)

**Q.**—If a person found lunatic by commission dies before the costs of the proceedings are taxed and paid, what is the solicitor's remedy for his costs ?

**A.**—The Lord Chancellor or Lord Justices may now make the same orders, and exercise the same powers for taxation and payment of the solicitor's costs after the death of the lunatic, as could have been made in his lifetime, and they have the same effect ; but they must be made within six years after the death : (23 & 24 Vict. c. 127, s. 29.)

**Q.**—What is the proper form in which a bill of costs must be delivered by a solicitor ?



**A.**—No particular form of a bill of costs is required by the Act, but it provides that the solicitor shall deliver or send to the party charged therewith, “a bill of his fees, charges, and disbursements, signed by the solicitor, or the executor, administrator, or assignee of such solicitor, or be inclosed in or accompanied by a letter subscribed in like manner referring to such bill:” (see 6 & 7 Vict. c. 73, s. 37.)

**Q.**—How soon after its delivery may a solicitor commence proceedings for the recovery of his bill of costs?

**A.**—The solicitor cannot commence an action for recovery of his bill until it has been delivered, as above pointed out, one (calendar) month, unless the court otherwise order: (see 6 & 7 Vict. c. 73, ss. 37, 48.)

**Q.**—How is an order of course obtained for taxation of a solicitor's bill, and what are the circumstances which will prevent it?

**A.**—The order of course is obtained on motion or petition of course, and can only be obtained by the client within one month after the delivery of the bill; nor can it be obtained after verdict in an action to recover the costs, nor as a rule after payment, nor it seems after action commenced: (Evans, Ch. Pr. 243.)

**Q.**—In what manner are applications for taxation of a bill, or for delivering up of deeds and papers, now to be made?

**A.**—By summons at chambers instead of by special petition to the court, except applications for orders of course, which may be made as heretofore: (Order Aug. 2, 1864, r. 1.)

**Q.**—Can a solicitor's bill be taxed after payment; and, if so, within what time, and under what circumstances?

**A.**—The bill may be taxed after payment under special circumstances. The order should be applied for within a year after delivery of the bill of costs. The application is by summons at chambers (Ord. LV. r. 2 (15)); and the special circumstances usually relied on are (1) where pressure has been exercised by the solicitor and immediate payment required; and (2) where there is error or overcharge in the bill: (Evans, Ch. Pr. 248.)

**Q.**—When a party is dissatisfied with the certificate of a taxing master, what course can he take to have the taxation reviewed?

**A.**—He should, before the certificate is signed, deliver to the opposite side and to the taxing master a written objection to the allowance or disallowance of any item or items, and apply to the master for a warrant to review the taxation. Being still dissatisfied with the allowance or disallowance of these items, he then applies by summons at chambers for an order to review the taxation: (Ord. LXV., r. 27 (37), (41).)

**Q.**—How is a bill of costs in the Chancery Division to be taxed, and how many distinct modes or principles of taxation are acknowledged by the court?

**A.**—The bill being prepared, the name of the taxing master in rotation is obtained, then a certified copy of the order indorsed with a reference to the master, and marked by his clerk, and a copy of the bill of costs, are left with the clerk. A warrant on leaving is next taken out and another to tax, and copies served on the other side. On the day

named in the warrant the solicitors attend, and the master taxes the bill. The certificate is then prepared and filed, and an office copy obtained. The modes of taxation are two; between party and party, and between solicitor and client. Also on the higher or lower scale: (Evans, Ch. Pr. 236.)

*Q.*—On what amounts is the lower scale of costs chargeable?

*A.*—In all causes and matters commenced after the Rules of 1883, and no higher fees are to be allowed in any case except such as by this order otherwise expressly provided for: (Ord. LXV., r. 8.) (*a*)

*Q.*—What parties are usually allowed to attend the taxation of costs?

*A.*—The persons usually allowed to attend the taxation of costs are the solicitors of the parties in the cause: (Hal. Suit, 94.)

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### PROCEEDINGS IN CHAMBERS.

[NOTE.—When the judgment is preliminary or interlocutory, as is usual in the first instance, the accounts and inquiries, &c., directed to be taken and made, are worked out by the judge's chief clerk in chambers.

*Question.*—State the mode of procedure before the chief clerks and judges in chambers.

*Answer.*—Proceedings in chambers are commenced by summons, which must be sealed, a copy left for the use of the chief clerk, and a copy served on the other side two clear days before the hearing if the application is made in an action, or seven days if it is a summons originating proceedings. The parties attend at the time appointed, and the chief clerk after hearing them and considering the evidence (if any) either makes or refuses the order. The party decided against may then ordinarily, if he pleases, appeal to the judge who attends at chambers on certain days for hearing summonses. The order is then drawn up, passed, and entered. If a judgment directs inquiries at chambers, the party having the charge of it (usually the plaintiff) leaves at chambers a certified copy of it, a copy of the writ, with list of the parties and their solicitors, and then issues a summons to proceed on the accounts and inquiries. On the return of this summons the chief clerk sees that all proper parties have been served, and states what evidence he shall require on each inquiry and account. Having taken the evidence, he makes and signs the certificate, which is then filed; but if either party is dissatisfied with it he may apply to the judge to vary it within eight clear days after.

*Q.*—Contrast the procedure in chambers in the Chancery Division with that in the common law divisions.

*A.*—The proceedings in the chambers of the Chancery Division are more judicial than those in the common law. The common law sum-

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(*a*) The higher scale may be allowed either generally in any cause or matter, or as to the costs of any particular application made, or business done, in any cause or matter, if, on special grounds arising out of the nature and importance or the difficulty or urgency of the case the court or a judge shall at the trial or hearing or further consideration of the cause or matter, or at the hearing of any application therein, whether the cause or matter shall or shall not be brought to trial or hearing or to further consideration (as the case may be) so order: (Ord. LXV., r. 9.)

monses were till lately all returnable at the same hour, whilst in the Chancery they were returnable at different hours. The orders of the chief clerks are made in the name of the judge to whom they are attached, whilst a master's order is made in his own name. In Chancery the judges only attend two or three afternoons a week to hear appeal summonses, &c., whereas at the common law divisions one judge attends every day. These are a few of the chief differences between the procedure in the chambers of the Chancery and common law divisions, but there are many others.

**Q.**—Can the procedure in the Chancery Chambers be improved, and how?

**A.**—When the officials are obliging and give facilities for the conduct of business in chambers (as they almost invariably do), we have always found the procedure work well; and now that the number of chief clerks has been increased, and the pressure of winding-up matters has diminished, we think there is no further change required at present.

**Q.**—What is the first usual proceeding in the chief clerk's chambers after the copy of the judgment or order, &c., has been left, and what is done thereupon?

**A.**—A summons is issued to proceed with the accounts or inquiries directed; and upon the return of such summons, the chief clerk is to be satisfied by proper evidence that all necessary parties have been served with notice of the order; and thereupon directions are to be given as to the manner in which the accounts and inquiries are to be prosecuted, the evidence to be adduced in support thereof, the parties who are to attend thereon, and the time within which each proceeding is to be taken: (see *Ayck. Pr.* 489, 9th edit.; *Hal. Suit*, 73, 74.)

**Q.**—Within what period is a judgment directing accounts and inquiries to be brought into the judges' chambers; and in case of default by the party entitled to prosecute the same, can any other party take steps to prosecute the judgment?

**A.**—The judgment must be brought in within ten days after the same has been passed and entered; and, in default thereof, any other party to the action or matter is at liberty to bring in the same and have the prosecution thereof, unless the judge otherwise orders: (*Ord. LV.*, r. 32.)

**Q.**—State some of the proceedings which are taken to the chief clerk's chambers on a reference in a suit for administration of assets.

**A.**—The copy judgment, &c., having been left, and summons to proceed issued, the accounts and inquiries directed will be proceeded with. The necessary accounts must be brought in, and advertisements for debts and claims issued. Claimants (other than creditors) must enter their claims in the claim book, and give notice thereof, and of the affidavit filed, to the solicitor in the action, and creditors send in particulars of their debts to the executor within the time fixed by the advertisement; or within four clear days before any adjournment of the matter, if no certificate of debts or claims has been made in the meantime. The executor then makes an affidavit of the claims and gives notice to the creditor. But a creditor need not make any affidavit or attend in support of his claim (except to produce his security) unless he is served with a notice requesting him to do so.

The chief clerk having completed the accounts and inquiries directed, makes his certificate as detailed *infra*: (Ayck. Pr. 508 *et seq.*, 9th edit.; Ord. LV.)

**Q.**—In what form do accounting parties bring their accounts into the chief clerk's office, and is the oath of the accounting party sufficient evidence of the payments?

**A.**—Where the judgment is in the common form, the account is simply a debtor and creditor account. The items on each side of the account are to be numbered consecutively, and the account itself must be verified by affidavit, and referred to therein as an exhibit. The oath of the accounting party is not sufficient where any payments exceed forty shillings; but such payments must be vouched by producing the receipts properly stamped: (see Hal. Suit, 74, &c.; Drew. Pr. 146, &c.)

**Q.**—Give a sketch of the contents of the affidavit of executors verifying the accounts, and answering the inquiries directed by a common administration judgment.

**A.**—The executors' affidavit should state that in the first schedule thereto is set forth a true account and inventory of the personal estate which the testator died possessed of or entitled to (not specifically bequeathed, if so in judgment), and the affidavit should negative the possession of any other personal estate.

It should next state the amount of funeral expenses, and whether paid, or to whom due. An account of the personal estate come to the hands of the executors (and not specifically bequeathed, if so in judgment), and of all payments by them, should be exhibited, marked A., and verified by the affidavit, and the receipt of any other sums should be negatived.

In the second schedule thereto should be set forth the account of personal estate outstanding, and the existence of any other should be negatived.

Where real estate has to be administered, the affidavit of the real estate which the testator died seised of or entitled to is set out in a third schedule, and a list of the incumbrances thereon in the fourth schedule. The existence of any others in either case being negatived.

An account, marked B., of the rents and profits of the real estate received by the executors should also be exhibited and verified by the affidavit: (see Cox's Forms, p. 156.)

**Q.**—An administration order directs an inquiry what children of the testator were living at his decease. Give an outline of the proper evidence in answer to this inquiry.

**A.**—Certificates must be produced of the marriage of the testator and of the births of all the children and of the deaths of any of them who may have died. These must be identified by an affidavit or statutory declaration made by some one well acquainted with the family, and further proof must be given by affidavit of the existence of the survivors at testator's decease.

**Q.**—What is the proper course to procure the attendance of a witness before the chief clerk?

**A.**—By subpoena issued from the Central Office upon a note from the judge: (Ord. XXXVII, r. 28.)

**Q.**—What are the proceedings to be taken on obtaining the chief clerk's certificate ?

**A.**—It is to be transcribed by the solicitor prosecuting the proceedings, and is then to be signed by the chief clerk at an adjournment to be made for that purpose ; except where, from the nature of the case, these proceedings can be done at chambers whilst the parties are present before the chief clerk. The certificate should, if no one is dissatisfied with it, then be signed and filed : (Evans' Ch. Pr. 143 ; Hal. Suit, 76.)

**Q.**—A party being dissatisfied with the chief clerk's certificate in a cause in which he is interested (for instance, a creditor whose claim has been disallowed), and desirous of taking the opinion of the court thereon, what is his course of proceeding under such circumstances, and within what time taken ?

**A.**—A summons must be taken out for this purpose within eight clear days after the certificate is filed. If no application be made within the eight days it will be binding on the parties, unless the court otherwise directs under special circumstances : (Ord. LV.)

**Q.**—Do the certificates of the chief clerks upon the inquiries prosecuted before them correspond with the reports of the late masters in Chancery ? Must such inquiries be prosecuted with or without the direct intervention of the judge, and has the suitor the right of appealing to a judge before or after the certificate is signed by the latter ?

**A.**—The certificates of the chief clerks correspond with the reports of the late masters, and the inquiries are prosecuted before them without the direct intervention of the judge. But an appeal lies to the judge after the certificate is filed by the chief clerk, as stated *supra* ; and any party may, pending the inquiry, take the opinion of the judge on any matter arising in the course of the proceedings : (Ord. LV., rr. 69, 70.)

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### SALE.

[NOTE.—When a sale of property is ordered by the judge it is carried on through the intervention of his chief clerk in chambers.

**Question.**—Define the difference between proceedings *in rem* and *in personam*, and say in what way the Chancery Division of the court acts when it directs the sale of real estate subject to the trusts of a will.

**Answer.**—Proceedings *in rem* actually deal with the property which is the subject of the action. Proceedings *in personam* merely direct certain persons to deal with the property.

When the court directs the sale of real estate it ordinarily directs the trustee to convey, in which case it acts *in personam* ; but if there is any incapacity in the trustees it will itself convey by means of a vesting order, in which case it acts *in rem*.

**Q.**—Trace the course of proceeding on a sale of an estate under the direction of the court, from the order directing the sale, to the confirmation of the certificate of the result of the sale.

**A.**—The plaintiff's solicitor having left the order, &c., in chambers, a summons to proceed thereon is issued and served. The advertisements

are then prepared by the solicitor, and approved and signed by the chief clerk, and inserted in the *Gazette* and newspapers. The particulars are next prepared, and with an abstract of title laid before the proper conveyancing counsel to the court for him to advise on the title, and draw and settle the conditions; after which the particulars and conditions are approved by the chief clerk, and printed, and two certified prints thereof left at chambers. The reserved biddings are then fixed by the chief clerk (on the usual affidavit of a surveyor as to the value of the property) and inclosed in a sealed cover.

The auctioneer and day of sale being appointed, a copy of the particulars and conditions of sale, signed by the chief clerk, and the bidding paper, affidavit, and directions are obtained at chambers, and handed to the auctioneer with the reserved biddings. The sale is conducted in the usual way, and when concluded the auctioneer makes the affidavit verifying the biddings and the signatures of the purchasers, and it is filed, the bidding paper and particulars being marked as exhibits. An office copy of this affidavit and the bidding paper and particulars are left at chambers, and the chief clerk thereupon prepares a certificate of the result of the sale, which is approved and filed in the usual way: (Evans, Ch. Pr. 737, *et seq.*)

**Q.**—A judgment directing a sale by auction of real estate having been carried into chambers, the solicitor having the conduct of the proceedings desires to forward the sale with all possible despatch. What papers should he be prepared with at the first appointment?

**A.**—The abstract of title, the proposals for sale, the particulars of the property, and the ordinary conditions of sale, the draft advertisements of the sale, the surveyor's valuation and report as to lotting the property, affidavit of fitness of proposed auctioneer and reasonableness of his charges the latter being set out in a letter from him: (see Ayck. Ch. Pr. 877, 9th edit.)

**Q.**—To whom does the court commit the conduct of a sale under its direction in an administration action? Under what circumstances may parties to the action bid?

**A.**—The sale is conducted by the solicitor to the plaintiff, who is considered as the agent for all the parties to the suit. The plaintiff's right to the conduct of the sale is not affected by the extent of interest of or possession of title deeds by other parties to the suit: (*Knott v. Cottee*, 27 Beav. 33.) If a party to the suit be desirous of bidding at the sale, it is necessary, unless the judgment contain such a direction, to obtain an order for such purpose, and in such case the court will not allow such party to conduct the sale: (Evans, Ch. Pr. 737.)

**Q.**—When an order has been made in an action directing a sale of real estate, and giving all parties liberty to bid, who conducts the sale?

**A.**—The conduct of the sale is never given to any party having liberty to bid, but the court will appoint some independent person to conduct the sale.

**Q.**—What is the distinction between a sale by auction by order of the Chancery Division or Bankruptcy Court, and an ordinary sale as regards a purchaser who signs no contract?



**A.**—The Statute of Frauds does not apply to a sale under the order of the court, so that in the case of such a sale, even although the purchaser had signed no written contract it would be enforced: (Dart. V. & P. 5th edit. 197, 198.)

**Q.**—What are the circumstances which will warrant the opening of biddings at a sale, and what is the course of proceeding for that purpose, and within what time to be taken?

**A.**—Unless there be some fraud or improper conduct in the management of the sale, the court cannot now open the bidding if the purchaser has bid a sum equal to, or higher than, the reserved price (if any). But upon the grounds above stated, any person interested in the land may apply by summons or special motion before the chief clerk's certificate of the result of the sale has become binding, for an order for this purpose, which the court or judge may order upon such terms as to costs or otherwise as may be thought fit: (30 & 31 Vict. c. 48, s. 7.)

**Q.**—If a person purchase an estate under the direction of the court, to whom does he pay the purchase money, and when is he entitled to a conveyance, and who bears the expense of obtaining its execution?

**A.**—The purchaser of an estate sold under the direction of the court pays the purchase money into court, i.e., the Chancery department of the Bank of England. An order is necessary for this purpose, obtained at chambers on summons. This being done, the purchaser is entitled to a conveyance of the estate and to the possession thereof. The conveyance is prepared at the expense of the purchaser, by his solicitor; but the vendor bears the expense of obtaining its execution by the parties: (Evans, Ch. Pr. 740 *et seq.*)

**Q.**—Estates are liable to the payment of debts, and such estates are vested in a tenant for life, or other persons having only a limited interest, and the remainder or reversion in fee is vested in other persons, whether within or out of the jurisdiction of the court; how can the sale of such estates be perfected, and under what authority?

**A.**—If a judgment be made for sale for the payment of debts, the court may direct the tenant for life, or person having a limited interest, to convey the whole estate in the premises of which he is only tenant for life, &c.: (see 11 Geo. 4 & 1 Will. 4, c. 47, s. 12; 2 & 3 Vict. c. 60.) By 22 & 23 Vict. c. 35, the trustees or the executors may convey if devised subject to the payment of debts: (and see 13 & 14 Vict. c. 60.)

**Q.**—A testator declares that his real and personal estate shall be subject to his debts and legacies. Is a purchaser of leaseholds from the executor bound to see that the debts and legacies are paid?

**A.**—The executor has reposed in him by the law the fullest power of disposition over the personal estate of the deceased, whatever may be the manner in which it has been bequeathed by the will, and in the event of a sale the purchaser is not bound to inquire if there are any debts remaining unpaid: (*Ewer v. Corbet*, 2 P. Wms. 148; *Russell v. Plaice*, 18 Beav. 21; Will. P. P. 380, 10th edit.)

**Q.**—A freehold estate stands limited to A. for life, remainder to his son B. (an infant) for life, remainder to the first and other sons of B. in

tail, and the settlement contains no power of sale. Can the estate be sold, and what proceedings are necessary for the purpose?

A.—Yes, the estate may nevertheless be sold by the authority of the Court of Chancery. The application may be made by A. upon petition in a summary way under the provisions of the 40 & 41 Vict. c. 18: (see sects. 16 and 23, *et infra*.)

Q.—What statute now regulates the procedure relating to leases and sales of settled estates? What is the rule as to insertion of notice of the application in newspapers?

A.—The 40 & 41 Vict. c. 18, consolidates the former statutes on this head. By sect. 31 of the Act notice of the application, if the court so directs (but not otherwise), shall be inserted in such newspapers as the court directs. (a)

Q.—Refer to any recent Act of Parliament under which the Court of Chancery Division (notwithstanding the absence of a power in a settlement) can authorise a sale or lease of settled estates without a special application to Parliament.

A.—The 40 & 41 Vict. c. 18, entitled “An Act to Consolidate and Amend the Law relating to Leases and Sales of Settled Estates,” is the Act referred to. (b)

Q.—State shortly the circumstances in which the court is, by the Act referred to, authorised to exercise jurisdiction, and the mode of proceeding.

A.—By this Act the court is empowered (notwithstanding the absence of such power in a settlement) to authorise leases and sales of settled estates where it is satisfied that they would be proper and consistent, and the settlor has not declared to the contrary, or Parliament already refused the application: (see 40 & 41 Vict. c. 18.) The application to the court is by petition in a summary way: (sect. 23.) It must be made with the consent of the persons mentioned *infra*: (see sects. 24, 25.) But tenants for life, &c., are empowered to make leases for twenty-one years without application to the court: (sect. 46; *et ante*, p. 241.)

Q.—How is the consent of a married woman taken to an application for sale under the Settled Estates Act? And who cannot be appointed?

A.—Her examination (whether of full age or not) is taken either by the court or by some solicitor appointed by the court for that purpose, who is to certify, under his hand, that he has examined her apart from her husband, and is satisfied that she is aware of the nature and effect of the intended application and freely consents thereto. If she is resident out of the jurisdiction of the court, it is not necessary that the person appointed be a solicitor of the court: (40 & 41 Vict. c. 18, s. 51.) The court will not appoint the solicitor in the matter, nor the solicitor to the husband: (Ayck. Pr. 572, 9th edit.)

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(a) The operation of this Act has been nearly superseded by the Settled Land Act, 1882, which enables the tenant for life to sell or lease without application to the court in ordinary cases.

(b) By 44 & 45 Vict. c. 41, s. 41, land held in fee by an infant, and leaseholds held by him at a rent, are to be deemed Settled Estate within the Act.

## PROCESS OF CONTEMPT.

*Question.*—What is the meaning of being in contempt?

*Answer.*—The meaning of being in contempt is where a party has disobeyed the rules, orders, or process of the court: (Holth. L. D., 2nd edit.)

*Q.*—In a case of contempt of the court, how is a party proceeded against?

*A.*—He is proceeded against by—1st, Writ of attachment. 2ndly, Serjeant-at-Arms. 3rdly, Sequestration; according to circumstances: (see Ayck. Pr. 60, 9th edit.; Hal. Suit, 12.)

*Q.*—In what cases may a writ of attachment now be issued for disobedience to a judgment or order?

*A.*—In the following cases, by Order XLII. :—

A judgment for the recovery by or payment to any person of money: (Rule 3.)

Or, for the payment of money into court (where attachment is authorised by law): (Rule 4.)

Or, for the recovery of any property other than land or money: (Rule 4.)

Or a judgment requiring any person to do any act other than the payment of money or to abstain from doing anything: (Rule 7.)

But leave of a court or judge must be first obtained on notice to the party: (Ord. XLIV. r. 2.)

*Q.*—How is an attachment issued, and to whom is it directed?

*A.*—If a party fails to comply with an order to answer interrogatories, or for discovery or inspection of documents, he is liable to attachment; leave is necessary in all cases now, and notice of the application must be given to the opposite party: (Ord. XLIV.) After leave is obtained the writ is prepared by the solicitor, and two præcipes made on paper, one of which is filed with the clerk of entries, who marks the writ and files the præcipe; the writ and other præcipe are taken to the clerk of records and writs, who seals the writ and files the præcipe. The writ is directed to the sheriff of the proper county, and a warrant granted to the undersheriff, who executes it: (Ayck. Pr. 60, 62, 9th edit.; Hal. Suit, 12, 20.)

*Q.*—What is the first thing to be done by a party in contempt, and who wishes to apply to the court on any other subject?

*A.*—He should first clear himself of the contempt, by doing the act for the non-performance of which he is in contempt. But it has lately been held that a defendant in contempt for non-compliance with orders of the court, and for non-payment of costs, is entitled to take any step required for the purposes of his defence: (*Haldane v. Eckford*, L. Rep. 7 Eq. 425.)

## JOINT-STOCK COMPANIES.

**Question.**—Mention all the modes you recollect by which a company can be incorporated. If a company is registered under the Companies Act, 1862, without articles of association, by what regulations are its proceedings governed?

**Answer.**—Under the civil law corporations were created by the mere voluntary act and association of their members. But in England the Sovereign's act and consent (express or implied) is necessary to the erection of any corporation. The mode in which the Crown's consent is expressly given is either by Act of Parliament or charter: (see Steph. Comm., vol. 3, 6th edit., pp. 129, 130, and note x.)

The registered company is regulated by Table A. contained in the 1st schedule to the Companies Act, 1862.

**Q.**—What statutory obligation applies to the formation of a trading partnership consisting of more than twenty persons?

**A.**—The partners must be registered as a joint-stock company, unless they are acting in pursuance of some other Act of Parliament or of letters patent: (25 & 26 Vict. c. 89, s. 4.)

**Q.**—What are the particulars required in a memorandum of association of a limited company under the Companies Acts of 25 & 26 Vict. c. 89, and 30 & 31 Vict. c. 131?

**A.**—1. The name of the company, with the addition of the word "limited."

2. The part of the United Kingdom where the registered office of the company is proposed to be situate.

3. The objects for which the company is to be established.

4. A declaration that the liability of the company is limited.

5. The amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount, subject to the following regulations:—(1) That no subscriber shall take less than one share; (2) That each subscriber of the memorandum of association shall write opposite his name the number of shares he takes: (Wms. P. P., p. 248, 10th edit.)

**Q.**—Describe briefly the jurisdiction of the court, Chancery Division, in winding-up joint-stock companies, and state under what authority the jurisdiction arises.

**A.**—If (1) the company has specially resolved to wind up by the aid of the court; or (2) does not begin for, or suspend business for, a year; or (3) if its members are reduced to less than seven; or (4) is unable to pay its debts, a petition may be presented to the court, Chancery Division, to wind-up the company. And the court may order accordingly, and appoint liquidators, settle list of contributories, collect the assets and distribute them; (5) the court may also order it when it would be just and equitable that it should be wound-up. This is done under the authority of the 25 & 26 Vict. c. 89, s. 79 *et seq.*: (see also 30 & 31 Vict. c. 131, ss. 40, 41.)

**Q.**—Explain the meaning of the terms "special resolution" and

“extraordinary resolution” as defined by the Joint-Stock Companies Act, 1862.

**A.**—A special resolution is one passed by a majority of not less than three-fourths of the members of the company qualified to vote, present either in person or by proxy (where proxies are allowed) at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled as aforesaid, and present in person or by proxy at a subsequent general meeting held at an interval of not less than fourteen days nor more than one month from the date of the meeting at which such resolution was first passed: (25 & 26 Vict. c. 89, s. 51.)

An “extraordinary resolution” is one passed in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution: (*Ib.*, s. 129.)

**Q.**—A limited company is desirous of reducing its capital by cancelling a number of shares which have not been taken up. In what way may the object in view be effected?

**A.**—The Companies Act, 1867 (30 & 31 Vict. c. 131, ss. 19, 20), now empowers any company limited by shares to modify by special resolution the conditions of its memorandum of association, so as to reduce its capital, provided the sanction of the court be obtained.

**Q.**—A limited company, registered under the Companies Acts, passes, by a bare majority, at an ordinary yearly meeting, a resolution varying one of its articles of association. Will the resolution hold good, and, if not, on what grounds is it open to objection?

**A.**—The articles of association can only be varied by a special resolution passed at any general meeting by a majority of not less than three-fourths of the members, and confirmed by a majority at a subsequent general meeting held after proper notice at an interval of not less than fourteen days. In the case given the resolution will therefore be invalid: (25 & 26 Vict. c. 89, ss. 50, 51.)

**Q.**—How does a joint-stock company enter into contracts which in the case of private persons (1) would be required to be under seal; (2) would be required to be in writing and signed by the parties to be charged therewith; (3) would be valid although not reduced to writing?

**A.**—Such contracts may be made on behalf of the company in case (1) in writing under the common seal of the company; (2) in writing signed by any person acting under the express or implied authority of the company; (3) by any person acting under the express or implied authority of the company: (30 & 31 Vict. c. 131, s. 37.)

**Q.**—A. B. agrees to do work for a limited company in consideration of the issue to him of fully paid-up shares in that company; what liability does he incur by accepting such shares, and how can such liability be guarded against?

**A.**—He will be liable to pay the full amount in cash, unless the agreement was in writing and filed with the Registrar of Joint-Stock Companies at or before the issue of the shares: (30 & 31 Vict. c. 131, s. 25.)

**Q.**—Under what circumstances will a share in a company be deemed to have been issued and held otherwise than subject to the payment of the whole amount thereof in cash?

**A.**—Where it has been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares: (30 & 31 Vict. c. 131, s. 25.)

**Q.**—In what circumstances and to what extent, if any, is a past member of a limited company liable to contribute to the assets of the company in the event of its being wound-up?

**A.**—Where the shareholders who are members at the time of the order for winding-up are exhausted, leaving liabilities of the company still to be discharged, the shareholders on the B list, which consists of those who had not ceased to be members for one year previous to the date of the winding-up order are liable to contribute to the extent of the amount still unpaid on their shares respectively. But such shareholders are not liable for debts contracted after they ceased to be members of the company: (25 & 26 Vict. c. 89, s. 38.)

**Q.**—A creditor of a company in course of being wound-up in the Chancery Division holds security. Can he, according to the last decision prove for the whole debt, or must he (as in bankruptcy) give credit for the value of the securities?

**A.**—Formerly he might prove for the whole debt: (*Killock's case*, L. Rep. 3 Ch. App. 769; *Re Oxford and Canterbury Hall Company*, 39 L. J. Rep. Ch. 775), but now he must value his security, and prove for the deficiency only (1875 Act, s. 10) if the assets are insufficient.

**Q.**—How, and upon what notice, is the order for winding-up such a company obtained?

**A.**—The company is wound-up by presenting a petition to the court, Chancery Division; or, if the company is working a mine within the jurisdiction of the Stannaries of Cornwall, to the court of the vice-warden thereof. The petition may be presented in certain events by the company, or a creditor, or a contributory. It must be advertised seven clear days before the hearing, once in the *London Gazette*, and, if the company be within ten miles of Lincoln's-inn Hall, once in the London daily morning newspapers, or, in the case of any other company, once in two local newspapers circulating in the district where the company is situate. The petition must be verified by affidavit, and served on the official liquidator, if one, and on the company: (Sm. Ch. Pr. 15 *et seq.*, vol. 2.)

**Q.**—What is the course of proceeding after such order is obtained?

**A.**—The order is advertised, an official liquidator is appointed, and the list of contributories settled; claims are advertised for and adjudicated upon, and the assets realised and distributed.

**Q.**—Under what circumstances can a limited company be wound-up voluntarily?

**A.**—In the following cases:

(1.) Whenever the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of



association that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound-up voluntarily.

(2.) Whenever the company has passed a special resolution requiring the company to be wound-up voluntarily.

(3.) Whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind-up the same: (Taylor's Manual on the Winding-up of Companies, part 2, chap. 1, p. 185.)

**Q.**—What are the respective liabilities of present and past members of the company?

**A.**—The present members of a limited company are liable to the extent of the unpaid capital on their shares. The past members, if they have not ceased to be members for one year previous to the date of the winding-up order, are put on the B. list, and are also liable to the like extent on default of their assignees, but they are not liable for debts of the company contracted after they cease to be members: (25 & 26 Vict. c. 89, s. 38.) If the company is unlimited and registered, the present members and members within a year are liable to the extent of the liabilities and costs of winding-up of the company.

**Q.**—What transfers of shares are permitted in the case of a limited company which is being wound-up by order of the court, and what transfers of shares are valid in the case of a company being wound-up voluntarily?

**A.**—In the first case all transfers are void unless the court otherwise orders, which it probably will do where shares have been *bonâ fide* transferred between the presentation of the petition and the order for winding-up in ignorance of the presentation of the petition: (Buckley on Companies, 288.)

In the second case no transfer can be made except with the sanction of the liquidator: (*Id.* 266.)

**Q.**—Can a joint-stock company formed under the "Companies Act, 1862," reduce the capital of the company, or the liability on the shares, by any, and if so by what, means?

**A.**—Any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations as originally framed, or as altered by special resolution, as to reduce its capital. The resolution is not to come into operation until an order of the court confirming the resolution is obtained, and registered by the Registrar of Joint-Stock Companies: (30 & 31 Vict. c. 131, ss. 9-12.)

**Q.**—A person who had been induced by the fraud of the company or its directors to become a shareholder may sometimes have a case in equity against the company and its directors to annul his contract of membership and to recover compensation for his loss. It is a question whether he can recover compensation in equity against the directors unless he can annul the membership against the company. How would you decide this question if you had to do so, and on what grounds?

A.—Sect. 35 of the Act enables the shareholder to seek compensation. As to whether the shareholder can annul his membership, the following points have been decided: (1) That where due diligence is used by a shareholder who has been misled either by misrepresentation or variance, in repudiating his liability he can avoid the contract as between himself and the company. (2) But though a contract induced by fraud is voidable as against the parties who induced it, it is not necessarily void against creditors who have acquired interests and rights in consequence of the fraud. (3) What is a good ground of remedy as against the company in operation, is not a ground of defence against the claims of creditors when the company has been ordered to be wound-up: (see *Overend and Gurney*, L. Rep. 2 App. Ser. Ho. Lords, 825.)

Q.—What remedies, and against whom, has a shareholder who has taken shares in a limited company on the faith of a prospectus which proves false in material particulars, and when must such remedies respectively be enforced?

A.—See *suprà*.

He may also bring an action against the promoters of the company if they were cognisant of the fraud: (see *Twycross v. Grant and others*, 46 L. J. Rep. 636.)

Q.—What is a “promoter” of a joint-stock company? A. is a promoter of a coal mining company, B. is the owner of a colliery which he is willing to sell for 50,000*l.* A. agrees with B. that the company shall purchase it for 60,000*l.*, B. paying A. 5000*l.* for “commission.” Discuss the principles of law bearing on this case and apply them to the facts.

A.—A promoter is one who promotes or causes the company to come into existence. The prospectus is issued by him, he is in a fiduciary relation towards the company he promotes, and if he sells to the company must make a full and fair disclosure of his interest and position: (see L.J. James’s judgment, *New Sombrero Phosphate Company v. Erlanger* 46 L. J. Rep. 425.) Being thus in a fiduciary position, any profit that he receives he must account for to the company. In this case, therefore, he must account for the 5000*l.* he received for commission to the company.

Q.—A. sells shares to B., B. does not pay the calls, and A. is sued for them. Was there any and what difference in the relief to which A. was entitled at law and in equity?

A.—There was an implied contract both at law and in equity that the transferee should indemnify the transferor; but equity would enforce completion of the transfer: (see *Evans v. Wood*, L. Rep. 5 Eq. 9; *Walker v. Bartlett*, 25 L. J. N. S. 263, C. P.; *Kellock v. Enthoven*, Ex. Ch. 43 L. J. Rep. Q. B. 90.)

Q.—What is a novation? What a delegation?

A.—Where an assurance company either transfers its business or amalgamates with another company, and a policy holder accepts the liability of the new company in lieu of the old, this is called “a novation” (see 35 & 36 Vict. c. 41, s. 7, as to this), it being a substitution of a new debtor in place of the old.

Whilst a "delegation" is an authority to another to act for the principal so as to bind him, thus the old company delegates its power to the new.

*Q.*—If a person transfer his shares in a company by way of mortgage, and the mortgagee pays calls or other payments for which he is liable as registered owner, can he under any, and what, circumstances, compel the mortgagor to indemnify him?

*A.*—It seems that the mortgagee cannot compel the mortgagor to indemnify him except the latter requires a re-transfer: (see *Phené v. Gillan*, 5 Hare, 1.)

### MISCELLANEOUS AND INCIDENTAL PROCEEDINGS.

*Question.*—State what are the principal proceedings which occur in the usual course of an action in the Chancery Division.

*Answer.*—They are the following: The plaintiff prepares and issues his writ, files copy, and serves the defendant with a copy, properly indorsed; the defendant then appears, and gives notice thereof to the plaintiff, upon which the plaintiff delivers statement of claim to the defendant. The defendant then puts in his defence, which may include a counter-claim, to which plaintiff may reply, which, if not a joinder of issue, leave must be obtained to put in any subsequent pleading; unless in special cases, interrogatories should not be delivered until after defence is put in, these being answered; notice of trial is then given, unless the evidence is taken by consent by affidavits, in which case it is not given till after the evidence is closed; the action is then set down for hearing and proper papers delivered to the judge; each party's solicitor then prepares his briefs and delivers them to counsel, attends the consultation, and must be ready in court with all necessary papers when the action is called on; and it will be argued by counsel, and a judgment or order made, which must be passed and entered. This is usually interlocutory, directing inquiries or accounts at chambers; these being made or taken, the chief clerk makes his certificate, which is filed, the action set down for further consideration, and final judgment obtained: (see further Rules and Orders.)

*Q.*—What is the meaning of an interlocutory application, and how made?

*A.*—Strictly speaking, all proceedings which occur between the issuing of the writ and the final judgment are interlocutory: (see Holth. L. D.), but what are usually termed interlocutory proceedings are the following: applications for time to plead, for leave to amend, for production of documents, to enlarge the time for taking evidence, to withdraw replication, &c.; and these are made at chambers, on summons (see Judges' Rep. 1852); or to dismiss the action and appoint receiver and the like, which are made to the court on motion: (see Hal. Suit, pt. 2.)

*Q.*—What is the distinction between applications to the court on motion and petition.

*A.*—They are both modes of making interlocutory applications to the court, but petitions may also originate proceedings. Applications involving

a single issue, as for injunctions, should be made to the court by motion; applications involving several issues, each requiring its own portion of proof, should be made by petition, as for payment of money out of court; for here the pedigree, construction of documents, &c., are in question. They are each divided into *special* and *as of course*. Strictly speaking, *all* motions are made by counsel, although some only require his signature, while petitions of course do not require his intervention: (Drew. Pr. 52; Hal. Suit. 86-91.)

**Q.**—A testator gave the income of a sum of 1000*l.* to A. for life, and the corpus on the death of A. to such of A.'s children as should then be living. The fund is invested to the credit of an action *X. v. Y.* "The account of A. for life and of his children in remainder subject to duty." On A.'s death his children instruct you to obtain payment of the fund out of court. State the form of application, the persons (if any) to be served, and all the evidence to be adduced in support.

**A.**—A petition should be presented in the action by the children of A. and served on the personal representative of A. Affidavits must be filed proving the marriage of A., his death, and the birth of all his children, and the death of any of them; the certificates must be made exhibits, and supported by affidavit of identity, the probate or administration of A. must be proved, the legacy duty must be paid and the receipts produced, and a certificate of the fund in court also obtained, and an affidavit of the proportionate amount of the last dividend payable to A.'s personal representative.

**Q.**—State the steps of an action to foreclose a mortgage of real estate, from first to last.

**A.**—The proceedings in a foreclosure action are the same as in any other action down to the judgment, which is in the first instance merely interlocutory, and directs a reference to chambers to take an account of principal and interest, and to tax the mortgagee's costs. When this is done, the chief clerk makes his certificate, stating what is due to the mortgagee, for principal, interest, and costs. The certificate must be transcribed, signed, and approved in the usual manner and filed. The mortgagor has by the judgment six months given him for payment of what is certified as due, and the mortgagee should attend at the time and place named to receive it. On making an affidavit of attendance to receive the money and non-payment, the court will on motion order that the defendant be absolutely foreclosed all equity of redemption. This judgment, like the preliminary one, must be drawn up, passed, and entered in the usual way, but it need not be served: (Ayck. Pr. 261-266, 9th edit.)

**Q.**—Your client has brought an action to recover a debt due to him and has obtained a judgment, but the debtor refuses to pay. The debtor has a life interest in funded property standing in the names of trustees. Can the judgment-creditor take any and what proceedings, and where, to render this life interest available for the payment of his debt?

**A.**—There are several remedies open to the judgment-creditor in such a case. He may apply to a judge for an order that the property may stand charged with the payment of the judgment-debt and interest. The application is made at chambers. The charge cannot, however, be

enforced for six months after the order: (see 1 & 2 Vict. c. 110, ss. 14-16; 3 & 4 Vict. c. 83.)

And by the 5 & 6 Vict. c. 5, a judge of the Chancery Division may, in like cases grant a restraining order. The order is granted upon motion or petition (sect. 4) supported by affidavit. A writ should, however, be issued within a reasonable time after the order is obtained, as it is only intended for interim purposes: (*Re Hertford*, 8 Jur. 71; and see Evans, Ch. Pr. 775.)

**Q.**—By what means can a person, having a security on funds in court in an action to which he is not a party, prevent their being paid out without notice, and obtain the benefit of his security?

**A.**—He should apply for a stop order, which, when made and duly passed and entered, or an office copy, must be left at the Paymaster-General's office. On this being done the fund in court will not be dealt with without notice being given him. An incumbrancer who has obtained a stop order, and duly served the same, thereby obtains priority over a previous incumbrancer who has not done so. The order can be obtained by summons if the assignor and assignee concur; if not it must be applied for on petition: (see Daniell's Ch. Pract. 1633-7, 6th edit.)

**Q.**—Your client proposes to lend money upon the security of the borrower's reversionary interest in a fund standing in the name of the Paymaster-General; state the best means of securing the repayment of the loan, and the course of proceeding for that purpose.

**A.**—The best course will be to obtain a stop order, which will prevent the transfer of payment of the interest, or any part of it, to the assignor without notice to the assignee. The order is obtained on summons, if the assignor and assignee concur; but if not, then by petition, which must be served on the assignor, and an affidavit of service made and filed, and an office copy procured. The order when granted is drawn up, passed, and entered, and a copy must be served on the assignor or his solicitor, and also a copy left at the Paymaster-General's office: (see Dan. Ch. Pr. *ib.*)

**Q.**—What is the difference between a charging order and a stop order?

**A.**—A charging order could formerly only be obtained at law by a judgment-creditor applying to a judge of the court in which the judgment had been obtained for an order that funded property standing in the names of trustees, in which the debtor had a life interest, might stand charged with the payment of the judgment-debt and interest. It can now be obtained in any division of the High Court. The application is made at chambers. The charge cannot, however, be enforced for six months after the order.

By the 5 & 6 Vict. c. 5, the Court of Chancery, now the Chancery Division, may in like cases grant a restraining order. The order is granted upon motion or petition, supported by affidavit.

A stop order is obtained from the court by a person interested in a fund in court, and secures that the fund will not be paid out or otherwise dealt with without notice to him.

**Q.**—Upon whom ought a petition or summons for a stop order to be served?

A.—Only upon the assignor and the persons interested in that part of the funds, &c., sought to be affected : (Ord. XLVI., r. 13 ; Dan. Ch. Pr. 1635, 6th edit.)

Q.—Is there any, and what mode, and under what authority, applied for the prevention of the transfer of stock standing in the books of the Governor and Company of the Bank of England, without resorting to a suit ?

A.—The old *distringas* is now abolished by Order XLVI., r. 2, and now by r. 4, any person interested in stock may, on making and filing an affidavit and notice in the form given in the schedule thereto, and serving office copy of the affidavit and duplicate notice on the company, prevent the transfer of stock for five years, which time may be extended by notice of renewal.

Q.—By what means can the party in whose name the stock is standing proceed to remove the restraint ?

A.—By an order to be obtained by motion on notice and by petition duly served. It may also be discharged on the written request of the party by whom it was given (*Ib.* r. 9.); or if any party in whose name the stock is standing applies to transfer it, he can do so after eight days if no order be obtained to the contrary : (*Ib.* r. 10.)

Q.—What are the steps necessary in the Chancery Division in order (1) to pay money into court, and (2) to obtain payment out ?

A.—1. In all cases, except under the Trustee Relief Acts, where an affidavit is filed instead, an order must be first obtained. Directions to pay in are then obtained in the Paymaster-General's office, and the money will then be received at the Chancery office of the Bank of England on production of the directions, which are returned by the bank with a certificate of receipt thereon, an office copy of the Paymaster-General's receipt is then bespoken and obtained.

2. To obtain payment out, an order is obtained (by petition if over 1000*l.*, by summons if otherwise, under Trustee Acts) verified by affidavit of the parties' title and certificate of the fund in court. The order is left at the Paymaster-General's, and the cheque bespoken, and the person named attends, with his solicitor to identify him, to receive the cheque : (Evans, Ch. Pr. 625 *et seq.*)

Q.—State in detail the steps to be taken to get money out of court by petition when the money has been paid in by a railway company.

A.—A petition must be prepared and presented, and the judge's fiat obtained in the usual way, and a copy of the petition left with the secretary for the use of the judge at the hearing of the petition. Copies of the petition must then be served on the railway company and all parties interested, and the original petition at the same time shown. An affidavit of service should be made, and be ready on the hearing : (see Hal. Suit, 90, 91 ; Ayck. Pr. 309, &c., 9th edit.) The application for the payment out of the money must be supported by an affidavit of the petitioner's title (*Ex parte Hollick*, 16 L. J. 71, Ch.); and that he is not aware of the



right of any other person (Ord. LII, r. 18); and a certificate of the fund in court, and such other evidence as may be necessary. (a)

**Q.**—What is the necessary statement which must be made at the foot of a petition?

**A.**—At the foot of every petition (not being a petition of course), and every copy thereof, a statement is to be made of the person, if any, intended to be served therewith; and if no person is intended to be served a statement to that effect is made: (Ord. LII, r. 16.)

**Q.**—What does the Paymaster-General require to authorise him to transfer stock?

**A.**—First, the judgment or order is taken to the registrar, and his certificate for the transfer obtained, which must be signed by him. This certificate must then be taken, with the judgment or order, to the Paymaster-General's office, together with a note, signed by the solicitor, containing the name, address, and quality of the party to whom the transfer is to be made, and into what stock. The Paymaster-General will thereupon make the transfer: (Ayck. Pr. 466, 9th edit.)

**Q.**—What is necessary to enable parties to receive cash from the Paymaster-General, either during the life or after the death of the party to whom or to whose representatives the order directs the money to be paid?

**A.**—The judgment or order (directing the payment) and the certificates (if any) must be taken to the Paymaster-General, in the proper division of the action; and, upon their being left with him and found correct, he prepares a cheque for the amount on the bank, which may generally be obtained on the second day following. For this purpose it is necessary for the solicitor to attend with the party to receive the cheque, in order to identify him. If the order be for payment to the party himself, or his personal representatives, in the event of his death before payment, the Paymaster-General will receive the probate of the will or letters of administration, a certificate of burial, and affidavit of identity, as proof of the death, and will pay the personal representatives. But no probate or letters of administration will be received if purporting to be granted six years after the date of the order directing payment (see Ayck. Pr. 467-469, 9th edit.); and now by the Supreme Court Funds Rules, 1884, r. 48, payments of all regular dividends or other periodical payments, and in other cases under 500/., can be made through the post on complying with the provisions of the rule.

**Q.**—What fact does the Chancery Paymaster require to be proved on each occasion of paying regular dividends under a power of attorney, and how is such fact evidenced?

**A.**—The fact of the person giving the power, and who is entitled to such dividends, being alive at the time when they are due, such fact being evidenced by affidavit of some person who has knowledge of it.

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(a) The court, on the hearing of such a petition, may order the money to be laid out and invested in the public funds; or may order it to be distributed, or the dividends thereof to be paid, according to the respective estates or interests of the parties applying: (see 8 Vict. c. 18, s. 78; Morgan's Statutes and Orders, pp. 45, 46.)

**Q.**—A man effects a policy of insurance on his own life, and declares on the face of it, under the Married Women's Property Act, 1870, merely "For the benefit of my widow and children," and dies leaving a widow and infant children; how can a good discharge be given to the insurance office, and is any application to the court necessary?

**A.**—A proper receipt could be given by a trustee appointed by the Chancery Division of the court in England or in Ireland, according as the policy was affected, or in England by the County Court Judge of the district, or in Ireland by the chairman of the Civil Bill Court of the division of the county in which the office is situated. An application to the court would be necessary: (see sect. 9.)

**Q.**—Name, and give a short description of, the several writs usually issued in the course of an action.

**A.**—The writs now usually issued in the course of an action are the following: *Subpœna ad testificandum*, issued where it is wished to compel the attendance of a witness to give evidence. *Subpœna duces tecum*, to compel a witness to produce any document in his possession. The *subpœna* and attachment to recover costs. The several writs to compel parties to answer interrogatories, and to enforce the judgments or orders of the court, which are, 1st, the writ of attachment, which is directed to the sheriff of the county or jurisdiction in which the defendant resides commanding him to attach the defendant so as to have him before the court on a particular day therein mentioned, to answer his contempt; 2nd, serjeant-at-arms, which is a prerogative process, and issues on the sheriff's return of *non est inventus* to an attachment; 3rd, sequestration, which is also a prerogative process, and is directed to certain commissioners therein named, empowering them to enter upon the defendant's real estate, and sequester the rents thereof, as also his goods, chattels, and personal estates, and keep the same until the defendant clears his contempt; 4th, writ of possession (and formerly a writ of assistance), which has already been described. Besides these there are frequently issued in an action writs of attachment, *ne exeat regno*, *distringas*, *fieri facias*, *elegit*, &c., all of which have been previously considered: (Evans' Ch. Pr. 996.)

**Q.**—Within what period must a subpœna be served, and does the same rule apply to all subpœnas?

**A.**—The service of a subpœna not being for payment of costs must be made within twelve weeks after the teste of the writ: (Ord. XXXVII., r. 34.)

**Q.**—Had the Lord Chancellor power to deliver judgment in any cause after he had retired from office?

**A.**—Yes; where cases had been fully heard by the Lord Chancellor, and were standing for judgment, he might within six weeks after he had delivered up the Great Seal, give in to the registrar of the court a written judgment therein signed by him; and a decree or order was to be drawn up in pursuance of such judgment; and every such decree or order had the same effect as if the judgment in pursuance whereof it was drawn up had been given in open court the day before the Lord Chancellor so delivered up the Great Seal: (15 & 16 Vict. c. 80, s. 60.)

*Powles v. Hargreaves*, 3 De G. M. & G. 430; *Trimingham v. Maud*, L. Rep. 7 Eq. 201.)

**Q.**—State generally the object and effect of the County Courts Equitable Jurisdiction Act (28 & 29 Vict. c. 99).

**A.**—The object of this Act is to give an equitable jurisdiction to the County Courts in trusts, specific performance, administration, &c., when the subject-matter in dispute does not exceed 500*l.* in value. It thus brings an equitable remedy within the reach of many who were debarred thereof by the heavy costs and fees paid in the High Court.

**Q.**—Over what cases has the County Court equitable jurisdiction?

**A.**—Over (1) the administration of real or personal estate; (2) trusts; (3) foreclosure and redemption; (4) specific performance, or the delivery up or cancelling the agreement of sale; (5) under the Trustee Relief Acts; (6) the maintenance or advancement of infants; (7) partnerships; (8) injunctions in the above cases; (9) partition or sale, &c., where in each case the amount in dispute does not exceed 500*l.*; (28 & 29 Vict. c. 99; 30 & 31 Vict. c. 142, s. 9; 31 & 32 Vict. c. 4, s. 12.)

**Q.**—What jurisdiction have the County Courts in cases of specific performance, and within what district must such jurisdiction be exercised?

**A.**—The County Court has jurisdiction where in the case of a sale or purchase the purchase money, or, in the case of a lease the value of the property does not exceed 500*l.* The jurisdiction must be exercised within the district of which the defendants or any one of them resides or carries on business: (Poll. C. C. 48.)

**Q.**—In an administration action under the equitable jurisdiction of the County Courts, within the district of what County Court must such action be commenced? Give the authority for your answer.

**A.**—The jurisdiction may be exercised by the County Court within the district of which the deceased person whose estate is to be administered had his last place of abode in England or in which the executors or administrators or any of them have their or his place of abode: (28 & 29 Vict. c. 99, s. 10.)

**Q.**—What powers have the County Courts in respect of applications and matters arising under the Settled Land Act, 1882?

**A.**—The same powers as the High Court as regards land not exceeding in capital value 500*l.* or in annual rateable value 30*l.*, and as regards capital money arising under the Act and securities in which the same is invested, not exceeding in amount or value 500*l.*, and as regards personal chattels settled or to be settled as in the Act mentioned not exceeding in value 500*l.*: (45 & 46 Vict. c. 38, s. 46 (10).)

**Q.**—Where proceedings are pending in the Chancery Division of the High Court of Justice, which might have been commenced in a County Court, how may such proceedings be transferred to a County Court, and on transfer of same what right of appeal have the parties thereto? Give the authority for your answer.

**A.**—Any of the parties may apply at chambers to have the proceedings transferred, or without any application, the judge may, if he think fit, make

an order to transfer. The parties will have the same right of appeal that they would have had, had the suit or proceeding been commenced in the County Court: (30 & 31 Vict. c. 142, s. 8.)

*Q.*—At the trial of an action in the County Court, has the defendant's counsel a right to sum up the defendant's evidence?

*A.*—The defendant's counsel has no such right, but the judge in his discretion may allow him to do so: (48 L. T. 393.)

*Q.*—Within what time must notice of appeal be given from the determination or direction of a County Court judge, under the equitable jurisdiction of the County Courts, and what security for costs must be given by the party appealing?

*A.*—The party appealing must give notice of appeal to the other party or his attorney within thirty days, and also deposit with the registrar of the County Court the sum of 10*l.* as security for the costs of the appeal. The thirty days limit may, however, be waived: (Pollock C. C. 236.)

*Q.*—In what cases are the vacations not reckoned in the times of procedure?

*A.*—The *Long Vacation* is not reckoned in the following:

Filing, amending, or delivering pleadings, unless otherwise ordered by a court or judge: (Ord. LXIV., r. 5.)

*Q.*—How is time computed?

1. Where a limited number of days from or after any date is allowed for taking a proceeding?

2. Where the time expires on a Sunday?

3. Where the time expires on a day when the office is closed?

*A.*—1. It is computed so as to exclude the day of the date, and include the last day for taking the proceeding. 2 and 3. In these events the party has in addition the whole of the day on which the office next opens to take the step: (Ord. LXIV., r. 12.)

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## A TIME TABLE IN AN ACTION.

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**ACCOUNT**, application for, where writ indorsed under Ord. III, r. 8, any time after the time for appearance has expired, by summons on affidavit, stating grounds of claim.

**AFFIDAVITS**, plaintiff's, filed, within fourteen days after consent to take evidence by affidavit, or within time fixed by consent or a judge.

„ defendant's within fourteen days of receiving list of plaintiff's or ditto.  
 „ by plaintiff in reply, within seven days after such fourteen days, or ditto.

„ notice of cross-examination thereon, within fourteen days after time for filing affidavits in reply.

**AMENDMENT** of pleadings, without leave

„ of claim, once before reply.

„ or if no defence, within four weeks of last appearance.

„ of counter-claim, &c., once before pleading to reply, or if none, within twenty-eight days from defence.

„ By leave—

„ within time named in order, or if none, within fourteen days of order, or as court or judge may allow.

„ Applications for leave to amend.

„ generally at any time, or at the trial.

„ to disallow amendment, within eight days of delivery of amended pleading.

**APPEAL**, generally within one year of entry of judgment, or by leave of Court of Appeal.

„ from interlocutory order within twenty-one days.

„ from judge at Chambers within eight days.

„ from Master at Chambers within four days.

„ from District Registrar within six days, or by leave.

„ from refusal of an *ex parte* motion within four days.

„ notice of, from final or interlocutory judgments, must be served fourteen days before.

„ „ from interlocutory order, four days before.

„ „ cross appeal (judgments) eight days before hearing.

„ „ (orders) two days.

**APPEARANCE**, within eight days of service of writ, or before judgment.

„ out of jurisdiction, within the time limited.

„ by person served with notice, within eight days of service.

**BILL OF SALE**, to be registered within seven days of execution in Queen's Bench Division.

**CERTIFICATE OF CHIEF CLERK**, summons to vary, within eight days of filing.

„ „ „ mortgagor to redeem within six months from.

**CLAIM**, when optional, delivered within six weeks of appearance, or by leave.

„ when required, within five weeks from plaintiff's receiving notice.

**COUNTER-CLAIM**, put in with defence.

**COUNTY COURT**, removal to, *in contract*, by defendant before appearance, by either party after issue joined; *in tort*, application by defendant at any time on affidavit that plaintiff is unable to pay costs.

**DEFENCE**, within ten days of delivery of statement of claim, or if none required, within ten days after appearance.

„ *puis darrein* continuance, within eight days after matter arose, and by leave.

**DISCONTINUANCE**, any time before taking any step after defence put in; after that, by leave.

**DOCUMENTS** to be admitted, within forty-eight hours after notice.

„ order for production obtained any time pending action.

„ notice to inspect, must be given within two days of service of notice to produce, where all documents are set out in affidavit, or within four days where not so set out.

„ production of, within three days of serving such notice.

**EVIDENCE** closed, on expiration of time for plaintiff filing affidavits in reply.

**EXECUTION**, within six years of judgment or by leave.

„ when change in the parties by death, by leave.

„ against garnishee in default of appearance or payment into court, by leave.

„ by *Fieri facias* or *Elegit*, immediately after judgment.

„ writs of, remain in force for one year, or may be renewed within that time for a year.

**INFANTS**, motion to appoint guardian *ad litem*, after time for appearance and on six clear days' notice.

**INQUIRIES**, order for, at any time, by leave.

**INTERLOCUTORY ORDERS**, for custody of property, any time after plaintiff's right appears from the pleadings, or by affidavit.

„ „ for mandamus, injunction, or receiver, by any party, at any time.

„ „ for preservation or inspection of property, or sale of perishable property by plaintiff any time after writ issued and notice to defendant; by any other party, after appearance and notice to the plaintiff.

„ „ for recovery of property detained by lien or as security, any time after right appears by the pleadings or by affidavit, on payment of money into court.

**INTERPLEADER**, after service of writ of summons.

**INTERROGATORIES**, in cases of fraud or breach of trust once without leave after statement of claim or with or after defence.

„ or by leave of court or judge in any case.

„ application to strike out, within seven days after service.

„ affidavit in answer, within ten days, or within such time as judge may allow.

**JOINDER OF ISSUE**, if reply is, within three weeks of delivery of last defence.

„ „ „ if after reply, within four days of previous pleading.

**JUDGMENT** in default of appearance, to writ specially indorsed, eight days after service.

„ when not specially indorsed, but claim is for debt or liquidated demand, after eight days from filing affidavit of service, and statement of particulars of claim.

„ or in default of defence.

„ summons for leave to enter on specially indorsed writ, returnable not less than four clear days after service.

„ setting down action or motion for, within one year from right to do so, or by leave.

„ motion for, by plaintiff, within ten days of trial.

„ by defendant, after ten days.

- JUDGMENT**, or by any party immediately after material issues have been determined.
- „ application to set aside, or for a new trial within eight days of trial if in London or Middlesex ; if elsewhere, within seven days after the end of circuit.
- „ „ if wrongly entered, or finding wrong, within four days of trial, or commencement of next sittings of divisional court.
- „ „ when party absent at trial, within six days of trial.
- NOTICE OF MOTION**, two clear days, except with special leave.
- „ „ „ to appoint guardian *ad litem*, six clear days.
- PARTIES**, application to add to, or strike out, any time before trial, or at trial.
- „ to discharge or vary an order to carry on action in name of new, within twelve days from service of order.
- PAYMENT** of debt to stay proceedings, within four days of service of writ.
- „ „ if out of the jurisdiction, within time limited for appearance.
- „ into court in satisfaction, any time after service of writ and before or with statement of defence.
- „ acceptance, by plaintiff, within four days where paid in before defence.
- „ „ or before reply, where paid in with defence.
- PETITION**, service of, two clear days before hearing.
- REPLY**, within three weeks of last defence.
- SUMMONS**, writ of, to be served within twelve months from date or six months from renewal.
- „ „ endorsed within three days of service.
- SUMMONS** at Chambers to be served two clear days before return.
- SECURITY FOR COSTS** to be applied for as soon as facts are known and before taking fresh step in the action.
- SERVICE OF PLEADINGS, NOTICES, &c.**, to be made before 6 p.m., or on Saturdays, 2 p.m.
- TAXATION**, in Common Law Divisions, notice of, one day.
- TRIAL**, notice of, ten days' full, 4 days' short.
- „ „ if none by plaintiff within six weeks of close of pleadings, defendant may give, or may move to dismiss.
- „ if not entered by plaintiff, in London cases by next day, defendant may do so within four days.
- TIME** computing, if not clear days, exclusive of first and inclusive of last, Sunday Christmas Day, and Good Friday not reckoned in periods of less than six days.
- VACATION, LONG**, not reckoned in time for filing, amending, or delivering pleadings, unless by leave of court or judge.
- „ „ no pleading to be amended or delivered in same without leave.
- WITNESS** to have forty-eight hours' notice of time and place of examination and cross-examination.
-

## APPENDIX.

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### MODE OF PROCEEDING, AND DIRECTIONS TO BE ATTENDED TO, AT THE EXAMINATION.

EACH candidate will (on entering the hall) have a number given to him, and will take his seat at the end of the table on which such number is placed.

On the first day the candidates will be required to answer questions (a) classed under the several heads of—

1. Preliminary.
2. Principles of Law and Procedure, in two papers, viz. :—
  - (a) In matters usually determined or administered in the Chancery Division of the High Court of Justice;
  - (b) In matters usually determined or administered in the Queen's Bench Division of the High Court of Justice.

*The answers to the preliminary questions, and to those contained in paper A. are to be brought up at One o'clock. The candidates may then retire for an hour.*

*At Two o'clock, paper B. will be delivered to the candidates.*

*The answers to the questions contained in this paper are to be brought up at Five o'clock.*

On the second day papers will be delivered to each candidate, containing questions in—

- |           |   |  |
|-----------|---|--|
| Optional. | { | <ol style="list-style-type: none"> <li>3. Principles of the Law of Real and Personal Property, and the Practice of Conveyancing.</li> <li>4. The Law and Practice of Bankruptcy.</li> <li>5. Criminal Law and Practice—Proceedings before Justices of the Peace.</li> <li>6. The Law Practice of the Probate, Divorce, and Admiralty Division of the High Court of Justice and Ecclesiastical Law and Practice.</li> </ol> |
|-----------|---|--|

*The answers to the questions contained in paper No. 3 ("Principles of the Law of Real and Personal Property") are to be brought up at one o'clock. The candidates may then retire for an hour.*

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(a) There are nominally fifteen questions in each of the three essential branches, and ten in each of the other branches, but they sometimes contain double that number. *Vide* questions at the Trinity Term Examination, 1859.

*At two o'clock, papers Nos. 4, 5, and 6, will be delivered to the candidates.*

*The answers to these papers are to be brought up at Five o'clock.*

Each candidate is required to answer *all* the Preliminary questions and also to answer in *three* of the other branches of the examination, viz. papers (No. 2) *A* and *B*, and paper No. 3 ("*Real Property and Conveyancing.*") The examiners will propose questions in "*Bankruptcy.*" in "*Criminal Law and Proceedings before the Magistrates,*" and on "*Probate, Divorce, Admiralty, and Ecclesiastical Law,*" in order that candidates who have given their attention to these subjects may have the advantage of answering such questions, and the correctness of their answers in these departments taken into consideration in summing up the merit of their general examination.

The answers under the *above-mentioned heads* are to be written on one side only on *separate* papers for each head; and the answers to each paper should be written *concisely* in a plain and legible manner, and *signed*.

When the candidate has finished his answers in each paper, he will deliver them (tied up), together with his printed copy of the questions, to the secretary at the examiners' table, and he will exchange the ticket given on his entrance for another ticket which he is to give to the person at the door when he goes away.

After the examination has begun, no candidate is to leave the hall (without permission obtained from the examiners) until he shall have delivered in his answers; and any candidate who leaves the hall without permission will not be allowed to return.

No candidate will be allowed to consult any book during his examination, or to communicate with, receive assistance from, or copy from the paper of another; and in case this rule is discovered to be infringed, both such persons will be considered *not to have passed their examination.* (a)

At the top of the red ink ruled sheets for the answers is printed this recommendation: "You are requested to consider every question carefully before answering it, and to answer every part of it, and not to answer merely in the affirmative or negative, but to state the reason for your answer."

The examiners require the candidate to "answer the question as directly as he can; and *after* he has thus answered he may illustrate or enlarge upon his meaning, but a *directly correct answer* is all that is required by the examiners to ensure the full number of marks:" (*From the Speech of Master Templar at the Hilary Term Examination, 1864.*)

The greatest number of marks for any one answer is ten. Therefore, if the candidate answers all the fifteen questions he gets 150 marks. If he gets seventy-five marks in each of the three indispensable branches he will pass: (*From the Speech of Mr. Cookson, at the Meeting of the Metropolitan and Provincial Law Association, held 1863.*) But seventy-five marks is the lowest number taken.

A wrong answer will not be considered unfavourably if it displays an acquaintance with the subject. But this, of course, will depend upon the number of correct answers besides, for the examiners require a majority of

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(a) The foregoing directions are laid down by the examiners, and a printed copy is given to each candidate on commencing his examination.

the questions in the three indispensable heads to be answered correctly, or seventy-five marks in each of the three indispensable branches.

Notwithstanding the printed recommendations at the top of the sheets for the answers, to answer every part of the question, still, if the candidate cannot give a direct answer to every part of the question, it will be better to state what he does know on the subject than to leave it entirely unanswered.

The result of the examination is made known to the candidate a few days after the second day's examination, by circular.

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## RULES MADE BY THE INCORPORATED LAW SOCIETY FOR THE HONOURS EXAMINATION.

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THE Rules for the Honours Examination, dated 20th February, 1880, shall not be in force after the 31st December, 1881, from and after which date the following shall be the rules for such Honours Examination.

Terms used in these Rules have (unless inconsistent with the context) the same meanings as they have in the regulations made by the society on the 27th November, 1877, as to the Preliminary, Intermediate, and Final Examination of persons intending to become solicitors of the Supreme Court (hereinafter referred to as "the regulations").

1. No honorary distinction (except local prizes already instituted) will be awarded by the society to any candidate in respect only of the Final Examination. All honorary distinctions awarded by the society will—with the exception mentioned—be awarded to candidates who pass the Honours Examination as hereinafter mentioned.

2. There shall be held in the hall of the society, or in such other place as the council may from time to time appoint, four voluntary examinations for honours in each year. The examinations shall take place on such days as the council may from time to time appoint.

3. The examination committee shall, with the assistance (so far as they may think proper to resort to the same) of the examiner or examiners to be appointed for the purpose by the council, conduct the Honours Examinations.

4. The council may, from time to time, by resolution, appoint such competent person or competent persons as they may see fit to be an examiner or examiners to assist the committee in the Honours Examination, and the council may at pleasure remove any examiner so appointed.

5. There shall be paid to every examiner so appointed, not being a member of the committee or of the council, such remuneration as the council may from time to time, by resolution, prescribe.

6. The Honours Examination shall be open to all candidates *without reference to age*, and shall be on the subjects specified for the Final Examinations in the regulations.

7. Every candidate who is eligible and desirous to compete for honours shall, at the time when he gives notice of his desire to be examined at any Final Examination, give notice in writing of his desire to be examined for honours. Forms of notice can be obtained at the office of the Society.

8. At each Honours Examination the candidates who, in the opinion of the committee, are deserving of honorary distinction will be arranged in three classes, and for the purpose of this classification the marks obtained by each candidate at the Final Examination will be taken into consideration, as well as those obtained by him at the Honours Examination.

9. The names of candidates placed in the first class in order of merit will be arranged, and every candidate placed in that class will, in addition to a class certificate, receive a prize.

The names of candidates placed in the second and third classes respectively will be arranged alphabetically, and every candidate placed in those classes will receive a class certificate.

The certificate will be in the following or an equivalent form :—

*Honours Examination.*

*By authority of the Council of the Incorporated Law Society of the United Kingdom.*

I do hereby certify that at the Honours Examination, held on the  
                   day of                   18                   ,                   who served his articles of  
 clerkship to                   , was placed in the first [second or third] class.  
*President.*

10. The names of all candidates who attain honorary distinction will be printed in the Society's calendar.

11. At each Honours Examination the following prizes will be awarded, unless in the opinion of the committee the standard attained should not justify the issue of any first-class list :—The Clement's Inn prize (value 10*l.* 10*s.*); the Clifford's Inn prize (value 5*l.* 5*s.*); and the New Inn prize (value 5*l.* 5*s.*); or an additional Society's prize of like value; and the Daniel Reardon prize, being one-fourth part of the dividend of 3333*l.* 6*s.* 8*d.* Consolidated Bank Annuities. In addition, the Society will give as many prizes (value 5*l.* 5*s.* each) as are required. The value of each prize will be expended by the Society in the purchase of legal, historical, or constitutional works, to be selected by the successful candidate, and such works will be bound at the expense of the Society, and be stamped with the arms of the Society.

12. In addition the following prizes will be awarded according to the result of the Honours Examinations during the year, namely :—

The Scott prize, being the dividend on 1265*l.* Preferential 4½ per cent. London, Brighton, and South Coast Railway Company's Stock (1863).

The Broderip Gold Medal, to be purchased with the dividend on 333*s.* 6*s.* 8*d.* Reduced Annuities.

N.B.—The fee payable on giving notice for the Honours Examination is 1*l.*

*July, 1883.*

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